Supreme Court, U.S.
FILED
992053 JUN 20 2000
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

DAVID HERN,

Petitioner,

v.

INTERMEDICS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment, the judicial deference afforded jury verdicts, and the policy favoring efficient administration of the courts support the retrial of all issues decided by the jury where only a few distinct and separable findings were challenged on appeal.

2. Whether isolated statements made in closing argument in a civil case constitute attorney misconduct warranting a reversal where the statements were corrected by the judge without objection and where the verdict shows that the jury was not prejudiced by the statements.

PARTIES TO THE PROCEEDING

Petitioner is David Hern. Petitioner was the plaintiff in the district court and the appellee in the Ninth Circuit Court of Appeals.

Respondent is Intermedics, Inc., which is now a division of Guidant Corporation. Respondent was the defendant in the district court and the appellant in the Ninth Circuit Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion (App. A) is unreported. The district court opinion (App. B) is also unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on February 3, 2000. The court of appeals denied Petitioner's timely petition for rehearing and petition for rehearing *en banc* on March 22, 200 App. G.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

This case also involves California's Proposition 51. The full text of California's Proposition 51 is set forth at App. H. The pertinent provision of Proposition 51, which is codified at California Civil Code § 1431.2(a), states:

> In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of the non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner commenced this action on June 2, 1993 by filing a complaint in the district court in which he alleged that he suffered injuries as a result of the failure of a heart pacemaker that had been manufactured by Respondent. The district court had jurisdiction under 28 U.S.C. § 1332 because of the diversity of citizenship between plaintiff, a California citizen, and defendant, a Delaware corporation with its principal place of business in Texas.

The district court ordered that the trial be bifurcated. The first phase would be on the issues of liability, compensatory damages, and whether Petitioner could recover punitive damages. The second phase would be on the amount of punitive damages. On February 18, 1997, the jury rendered

its special verdict on the first phase of the trial. App. D. The jury answered 29 separate questions on the special verdict form, finding for Petitioner on his claims of strict product liability, negligence and breach of warranty and for Respondent on the claims for intentional infliction of emotional distress and fraud. The jury also apportioned fault among Petitioner, Respondent and "Other";[1] awarded Petitioner compensatory damages of $121,883; and found that there was clear and convincing evidence that the Respondent acted with malice and oppression. App. D.

As a result of the jury's finding of malice and oppression, Petitioner was entitled to a trial on the issue of punitive damages. The second phase of the trial took place on March 3, 1997, two weeks after the jury's initial verdict. That same day, the jury awarded punitive damages of $1.55 million. App. F. The district court entered a judgment in favor of Petitioner, and against Respondent, in the amount of $1,640,886.93 on March 6, 1997. App. C.

The district court denied Respondent's motion for a directed verdict and/or a new trial in its entirety on August 11, 1998. App. B at 42a. On appeal to the Ninth Circuit, Respondent raised the following issues: (i) the district court denied Respondent the opportunity to blame Petitioner's injuries on his former physicians at Kaiser Medical Center ("Kaiser"); (ii) the jury's verdict is internally inconsistent; (iii) the district court allowed Petitioner's attorney to incite the jury during closing argument on punitive damages; and (iv) the award of punitive damages was excessive. App. A at 2a. Respondent sought different relief on each claim.

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1. The jury's attribution of fault to "Other" was subsequently corrected in a supplemental verdict. App. E.

Regarding the Kaiser issue, Respondent asked the court to reverse and remand for a new trial *only* on the apportionment of compensatory damages and on the amount of punitive damages. On the inconsistent verdict issue, Respondent asked for a new trial on the issue of whether it acted with malice and oppression. On the last two issues, Respondent argued that it was entitled to a new trial on the amount of punitive damages. Respondent did *not* ask the court of appeals to overturn the jury's finding of liability for strict product liability, negligence or breach of express warranty, nor did it ask the court to order a retrial on the amount of Petitioner's compensatory damages.[2]

Despite Respondent's request for limited relief, and despite the court's findings on only two limited issues on appeal, the court of appeals reversed the entire judgment. The court found that Petitioner's counsel made improper references to matters that were not in evidence during her closing argument in the punitive damages phase of the trial. App. A at 3a-12a. The court found that these remarks were prejudicial and influenced the jury's decision. App. A at 11a. The court also found that the district court should have allowed Respondent to argue that Kaiser was also responsible for Petitioner's injuries. App. A at 12a-15a.[3] The court ordered a new trial on liability and damages. App. A at 15a.

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2. While Respondent did seek a reversal of the jury's determination that it had acted with malice and oppression, the ground for this request was that the jury's findings on these issues were allegedly inconsistent with the jury's verdict on Petitioner's claim for intentional infliction of emotional distress.

3. The court of appeals did not rule on the two other issues that Respondent raised (*i.e.*, that the jury's verdict was inconsistent and that the amount of punitive damages was excessive).

B. The Court of Appeals Ordered a Retrial on Liability Because the District Court Did Not Allow Respondent to Argue that Another Actor Was Also Responsible for Petitioner's Injuries

Until the adoption of California's Proposition 51, defendants in personal injury actions were jointly and severally liable for all compensatory damages. A plaintiff in California could collect the entire judgment against any one of the defendants that was found liable. With the adoption of Proposition 51 in 1986, however, that rule changed. A defendant in California is now liable only for the amount of non-economic damages (*e.g.*, pain and suffering) allocated to that defendant in direct proportion to that defendant's percentage of fault. A defendant in a personal injury action is still jointly and severally liable for economic damages, (*e.g.*, medical expenses and loss of income). App. H. Petitioner's non-economic damages on his strict product liability and negligence claims were $68,704 (App. D at 49a) of the total compensatory damages of $121,883.[4] App. D at 51a.

Petitioner was barred by an arbitration agreement from suing his treating physicians at Kaiser in his federal action,[5]

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4. The compensatory damages also included $15,000 for breach of warranty (App. D at 50a), which is not subject to comparative fault principles and, therefore, is not subject to Proposition 51. App. H. Despite that fact, the Ninth Circuit reversed the entire judgment.

5. Petitioner arbitrated his claims against Kaiser and the arbitration panel found that Kaiser was not liable to Petitioner for his injuries. SER at 62-76. ("SER" refers to Appellee's Supplement Excerpts of Record filed with the Ninth Circuit.) Petitioner moved

(Cont'd)

and Respondent did not file a third-party complaint against Kaiser. Consequently, Kaiser was not a party to the action and was not present to defend itself. Respondent attempted to prove at trial that Kaiser was responsible for Petitioner's injuries, because Kaiser failed to warn Petitioner that his pacemaker was potentially defective. As a result of Proposition 51, Petitioner's non-economic damages could be reduced by the percentage of fault the jury attributed to Kaiser, provided that the jury found Kaiser was also responsible.

The district court refused to allow Respondent to argue to the jury that Kaiser was responsible on the ground that there was insufficient evidence for the claim to go to the jury (RT at 1676-78[6]), even though Respondent had been given a full and fair opportunity to present evidence on that issue. The court of appeals reversed the district court's determination regarding this issue, finding that the district court erred in ruling that expert testimony was required to prove that Kaiser had committed medical malpractice against Petitioner. App. A at 12a-15a. The court of appeals found that, as a result, Respondent is entitled to a new trial on the issue of whether Respondent is "liable for [Petitioner's] injuries." App. A at 15a. Presumably a retrial on liability must include all of the findings of fact included in the jury's special verdict form, including whether the pacemaker was defective and whether Respondent acted with malice and oppression.

(Cont'd)
prior to trial to exclude evidence that Kaiser was liable to Petitioner based upon the arbitration award (SER at 47-76), but the district court denied that motion. SER at 88-89.

6. "RT" refers to the Reporter's Transcript.

C. The Court of Appeals Ordered a Retrial on Damages Because of Counsel's Alleged Misconduct at Trial

The court of appeals held that Petitioner's counsel made statements during closing argument in the punitive damages phase that were prejudicial because Petitioner was seeking punitive damages. App. A. at 11a.[7] The Ninth Circuit did *not* find that counsel's statements caused the jury to award punitive damages that were excessive in light of the evidence. Nor did the court of appeals find that the punitive damages award was not supported by the evidence. Instead, the court of appeals found that the jury's verdict was "influenced" by the improper remarks because of the court's objection to the nature of the remarks. App. A at 11a. The court ordered a new trial on "damages" (App. A at 15a), which seems to also include compensatory damages, even though the allegedly improper remarks were made in a separate proceeding two weeks after the jury awarded compensatory damages and when the only issue still to be decided by the jury was the amount of punitive damages.

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7. The allegedly improper statements were that persons other than Petitioner were injured or died when the same model pacemaker failed because of the same defect. The trial court had found that there was evidence to support the argument. App. B. at 31a. The court of appeals found that there was no evidence in the record to support this argument. *See* App. A. at 8a.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT, OTHER CIRCUITS, AND THE NINTH CIRCUIT REGARDING WHEN A NEW TRIAL ON ALL ISSUES IS REQUIRED.

The court of appeals determination that Respondent is entitled to a new trial on liability and damages conflicts with long-standing Supreme Court precedent. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

In *Gasoline Products*, the Supreme Court considered for the first time whether the Seventh Amendment requires that an issue properly decided by a jury must be retried because justice demands that a separate and distinct issue, which was erroneously decided, be heard by a second jury. *Id.* at 498. The Court held that the Seventh Amendment does not so require where the issue to be retried is "so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500.

Generally, the courts have held that full retrials are only required in two instances. The first instance is when "an error or insupportable damages award calls into question the propriety of the *original* jury's finding of liability." *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F.3d 1221, 1255 (10th Cir. 1999) (italics in original). The second case is where a limited retrial would cause confusion and uncertainty because the issues are too intertwined. *Id.* at 1255-56.

A number of circuit courts have had the opportunity to apply the Supreme Court's reasoning in *Gasoline Products* to factual circumstances similar to those presented to the court of appeals in this case. Those courts have generally held that a retrial of the entire case is not required. Indeed, the courts have allowed a jury's finding of liability to stand even when requiring a retrial on damages. *See Crockett v. Long Island Railroad*, 65 F.3d 274, 278-79 (2d Cir. 1995); *Trejo v. Denver & Rio Grande Western Railroad Co.*, 568 F.2d 181, 185 (10th Cir. 1977). The courts have also allowed a jury's award of damages to stand even though a retrial was required on the issue of the defendant's liability (or the plaintiff's comparative liability). *See Winn v. Lafayette Town House*, 839 F.2d 835, 837 (1st Cir. 1988); *contra Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 13-14 (1st Cir. 1998) (new trial required on all issues where trial court's failure to instruct jury on comparative negligence may have led jury to increase the total award of damages); *Atkins v. New York City*, 143 F.3d 100, 104 (2d Cir. 1998) (new trial required on all issues where issues were vigorously contested and verdict on damages was inconsistent with the facts). The courts have been particularly loathe to vacate a jury's entire verdict when the jury had rendered a special verdict, *see La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 738 (1st Cir. 1994), or when a party had not appealed from other aspects of the jury's verdict. *See Rosario v. Livaditis*, 963 F.2d 1013, 1022 (7th Cir. 1992).

Trejo is particularly instructive on this point. *Trejo* involved a claim under the Federal Employers' Liability Act, 45 U.S.C. § 151, *et seq*. Plaintiff, a laborer on a work train, was injured while unloading creosote-soaked tiles from a moving car. 586 F.2d at 182. The jury's verdict was in two parts. The first was a finding "in favor of plaintiff and against

defendant," and the second was an award of "general, special and compensatory damages" in the amount of $140,000. *Id.* at 184. The jury did not expressly rule on whether plaintiff was negligent, even though it had been instructed on contributory negligence. *Id.* at 183.

The Tenth Circuit reversed the jury's damages award on the ground that the trial court told the jury it could award plaintiff the actual costs of his medical treatment when there was no evidence in the record that plaintiff had incurred any such costs. *Id.* at 183. The court determined, however, that retrial should be limited to the amount of plaintiff's damages and the extent of plaintiff's contributory negligence. In so holding, the court stated:

> The [defendant] had its day in court on the issue of liability, and the jury found it liable. The erroneous instructions regarding damages in no way prejudiced that finding, and the [defendant] is not entitled to a second chance to convince another jury that it was not negligent. The plaintiff submitted his case to a jury and persuaded that jury that the railroad was liable. He has a legitimate and important interest in the finality of the judgment, and should not, because of erroneous instructions on damages, be required to relitigate the issue of liability. Where, as here, we can protect the plaintiff's interest in the determination of liability without prejudicing the rights of the defendant, we should do so.

Id. at 185; *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774-75 (9th Cir. 1981).

Similarly, *La Plante* was a product liability case involving an all-terrain vehicle. The jury awarded plaintiff $9,652,000 in compensatory damages, which was reduced to $8,204,200 to account for plaintiff's comparative negligence. 27 F.3d at 734. The First Circuit reversed the jury's finding of liability on the ground that the trial court refused to instruct the jury on the affirmative defense of "subsequent alteration," which is available under Rhode Island law. *Id.* at 735-38. The court held that all issues pertaining to liability must be retried. *Id.* at 738. However, the court held that there was no basis to require a retrial on damages, particularly because the jury had answered detailed interrogatories related to damages. *Id.*

Furthermore, in this diversity case, the applicable state law supports the view that the issue of Kaiser's responsibility is separate and distinct from the other issues decided by the jury, including Respondent's fault and the findings of malice and oppression. The California courts have expressly held under similar circumstances that it is appropriate to limit the scope of a retrial to apportionment of damages. *See Schelbaur v. Butler Manufacturing Co.*, 35 Cal. 3d 442, 457 (1984) ("[t]here is no reason to subject the parties and the courts to the expense and delay of retrial on those issues on which the jury and the trial court agreed and which are supported by the evidence"); *O'Kelly v. Willig Freight Lines*, 66 Cal. App. 3d 578, 583 (1977) (new trial should be limited to apportionment of damages). California law also does not require a retrial on liability or compensatory damages if an award of punitive damages is reversed. *Torres v. Automobile Club of Southern California*, 15 Cal. 4th 771 (1997).

Here, the court of appeals did not discuss whether there were separate and distinct issues decided by the jury that

need not be relitigated. The court simply ordered that a new trial encompass issues of "liability" because Respondent had not been allowed to argue to the jury that Kaiser was responsible. App. A at 15a. The court did not offer any rationale for ordering a retrial of liability when Respondent had not requested a new trial on liability, had not appealed from certain aspects of the jury's verdict, had only raised the issue of apportionment of non-economic damages, and State law clearly supports the view that the issues to be retried were separate and distinct.

The jury's special verdict form allowed the court to determine which issues are separate and distinct from the issues of Kaiser's responsibility. The original jury answered a series of questions to determine that: (i) Respondent is liable to Petitioner for strict product liability, negligence and breach of warranty; and (ii) Respondent acted with malice and oppression. The court's reversal on the apportionment issue does not call into question the jury's findings on either of these matters. Respondent should not be given a second opportunity to convince a jury that its pacemaker was not defective and that it did not act with malice and oppression. Neither party will be prejudiced if the jury's findings of fact on these issues are allowed to stand. However, Petitioner will be severely prejudiced by the delay and expense required by a new trial of the entire case.

A second jury could also determine the apportionment of Petitioner's non-economic damages among the responsible parties (including Petitioner) without causing confusion between the two verdicts. The district court will be able to instruct the jury that they must find that Respondent is liable to Petitioner and that Petitioner is also partially at fault. The jury will be asked to decide only whether Kaiser is also

responsible and, if so, to allocate a proportion of fault to all three parties.

The failure of the court of appeals to properly apply Supreme Court precedent, or even to address the issue of the scope of a retrial, is an issue that should be addressed by this Court. This case presents the Court with an opportunity to consider whether the courts of appeals should regularly address the issue of limited retrials when reversing a judgment that was erroneously decided on one or more limited issues. Any other result is unfair to the parties and will burden the district courts with retrials on matters that were fully heard and fairly decided by a jury.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND DECISIONS IN THE NINTH CIRCUIT, REGARDING WHEN A CIVIL VERDICT SHOULD BE REVERSED FOR ATTORNEY MISCONDUCT.

The issue of attorney misconduct is one the courts never like to see and the accused attorney never likes to bring forth. However, the determination by the court of appeals that Respondent is entitled to a new trial on damages because of alleged attorney misconduct in the final closing argument of the punitive damages phase conflicts with the holdings in other circuits, as well as the settled rule of law in the Ninth Circuit. Because the Supreme Court has never ruled on the appropriate standard for judging attorney misconduct in civil cases, it is appropriate that the Court exercise its supervisory power in this case to provide direction to the lower courts and to avoid conflict between the circuits, which is signaled by the Ninth Circuit's decision here.

In this case, the court of appeals held that the award of damages must be retried because the court was "persuaded" that counsel's improper statements "influenced" the jury. App. A at 11a. However, other circuits, as well as the Ninth Circuit, have consistently held that a reversal is required *only* if the damage award itself indicates that the jury was *prejudiced* by counsel's improper statements. *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 278 (5th Cir. 1998) (size of award indicates jury was influenced by passion and prejudice); *Sasaki v. Class*, 92 F.3d 232, 237 (4th Cir. 1996) (the jury undoubtedly adjusted its award as a result of an improper statement by plaintiff's attorney); *Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 713 (7th Cir. 1992) (no prejudice is shown if damage award is supported by the evidence); *Lockley v. Deere & Co.*, 933 F.2d 1378, 1388-89 (8th Cir. 1991) (statements were not clearly injurious where damages were not grossly excessive); *Kehr v. Smith Barney Harris Upham & Co., Inc.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (reversal not warranted where jury's verdict is not excessive); *contra Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 363-64 (3d Cir. 1999) (new trial may be granted where it is reasonably probable that improper statements influenced jury); *Pappas v. Middle Earth Condominium Assoc.*, 963 F.2d 534, 540 (2d Cir. 1992) (new trial should be granted where remarks during closing argument unfairly influenced the verdict).

In *Kehr*, the appellants argued that the trial court abused its discretion in failing to order a new trial on the ground of attorney misconduct. The misconduct occurred during both opening and closing statements. 736 F.2d at 1285. The Ninth Circuit held that three factors must be considered before finding that counsel's misconduct "sufficiently permeate[d] an entire proceeding to provide conviction that the jury was

influenced by passion and prejudice in reaching its verdict." *Id.* at 1286. The court must first consider when the offending remarks occurred and whether they were isolated rather than persistent. Second, opposing counsel must object to the remarks and move for a mistrial at the end of the argument. Finally, the court must consider whether the award of damages was excessive. *Id.* If the damages are not excessive, the jury could not have been influenced by passion or prejudice. *See also Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985) (new trial not required where there is no showing that exposure to inadmissible evidence "affected the outcome of the case"). Thus, *Kehr* stands for the proposition that a district court does not abuse its discretion in refusing to grant a motion for a new trial based solely upon improper remarks of counsel during closing argument, especially where the jury has not awarded excessive damages. *See also United States v. Marine Shale Processors*, 81 F.3d 1361, 1371 (5th Cir. 1996) (attorney misconduct must permeate the record and cast doubt on the verdict).

The Third Circuit reached a contrary conclusion in *Greenleaf*. In that case, plaintiff's counsel made a number of improper statements to the jury, including asking the jury to "send a message" to the defendants with their verdict. 174 F.3d at 364. The court held that a new trial may be granted only where it is "reasonably probable" that the verdict was influenced by prejudicial statements. *Id.* at 363-34.

These cases are irreconcilable. The Court should address the obvious conflict among the circuits as to whether an attorney's remarks during closing argument that relate solely to the amount of punitive damages are sufficiently improper to warrant a new trial.

III.

THE QUESTIONS PRESENTED ARE IMPORTANT.

The questions presented for review are important, because they affect the integrity of jury verdicts and the conduct of counsel in the district courts. With the explosion of litigation in recent years, the federal courts are taxed to the limit. While the appellate process is critical to protecting the rights of all litigants, the courts of appeal should take care to limit the scope of any retrial where the facts and applicable law warrant such a result. The courts of appeal should be specifically required to address the issue of a limited retrial when reversing a jury verdict and to provide guidance to the parties and the district court as to the scope of the retrial and the reasons for ordering a limited or complete retrial. A decision that is vague and ambiguous with respect to this issue will lead to confusion on remand and further uncertainty for the parties. The Court should hear this case to protect the integrity of jury verdicts and the principles of the Seventh Amendment in future cases where a limited retrial is appropriate. Moreover, review of this case would provide the Court with an important opportunity to guide the lower courts on this issue, the first such opportunity since the seminal decision in *Gasoline Products* in 1931.

The issue of when attorney misconduct warrants a retrial in a civil case is also important to the integrity of the judicial process. Attorneys appearing in district courts should have clear guidance as to when an improper statement may lead to reversal of a jury verdict, and attorneys appearing in one district court should not be held to a different standard than those in other courts. This Court should decide whether reversal is proper if the lower court merely believes that the

jury may have been influenced by counsel's improper statements, or if the court must find that the statements clearly affected the outcome of the case. The Court should hear this case to resolve a conflict among the circuits, because this issue is important to the conduct of trials in the future, and to avoid frivolous appeals based upon an ambiguous standard.

IV.

THE DECISION BELOW IS ERRONEOUS.

In this case, the Ninth Circuit failed to follow the controlling precedent of this Court and a plethora of cases from its own circuit. By ordering a retrial on the issues of liability and damages, the court failed to follow this Court's long-standing precedent that a limited retrial is warranted where the issues to be retried are distinct and separable from the other issues already decided by the jury. *Gasoline Products*, 283 U.S. at 500. The Ninth Circuit's failure to follow this Court's precedent constitutes a clear error of law and has resulted in a miscarriage of justice. Petitioner should not be required to retry his entire case, including issues that were not challenged on appeal and are not even remotely implicated by the court's decision on appeal.[8] Neither the parties nor the courts are served by such a result.

The Ninth Circuit's decision on the misconduct issue is contrary to the holdings in a series of cases previously decided in that circuit. *See Kehr*, 736 F.2d at 1286; *Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1107-08

8. Petitioner called two expert witnesses to prove Respondent's liability and two to prove the amount of damages. Petitioner would suffer a serious hardship if he was required to have these witnesses testify again at retrial on issues that were not challenged on appeal.

(9th Cir. 1991); *Chalmers v. City of Los Angeles*, 762 F.2d at 760-61; *Matyeko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1991); *Glover v. BIC Corp.*, 987 F.2d 1410, 1421-22, *superseded and issue mooted*, 6 F.3d 1318 (9th Cir. 1993).[9] In each of those cases, the Ninth Circuit held that attorney misconduct consisting of improper statements during closing argument does not warrant a reversal, especially where the jury has not awarded excessive damages. The court of appeals erred by placing undue emphasis on whether counsel's statements were inappropriate, and by completely ignoring the critical issue of whether those remarks in any way affected the outcome of the case.[10] It is clearly improper for the court of appeals to punish Petitioner for conduct at trial that the Ninth Circuit has repeatedly held is insufficient to warrant a reversal.[11] Petitioner's attorney should not be held to a standard of conduct that is higher than that imposed upon every other attorney who has ever appeared in any district court in the Ninth Circuit, and is contrary to well-established precedent.

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9. In addition to the published opinions cited, Petitioner located 10 unpublished decisions in the Ninth Circuit reaching the same result, contrary to the holding in this case. App. I. Petitioner does not cite these cases as authority, but only to show that the Ninth Circuit has consistently rejected the very result ordered in this case. *See* Ninth Cir. R. 36-3.

10. Indeed, the trial court had considered the argument that counsel's statement had prejudiced the jury and held that there was "no substantive merit to Intermedics' contentions." App. B at 30a. Ordinarily, the appellate courts defer to the trial court on the issue of whether statements by counsel impacted the jury. *See Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984).

11. The court of appeals clearly raised due process issues where it adopted a new standard for attorney misconduct and then retroactively applied that standard to punish Petitioner's counsel. *See City of Chicago v. Morales*, __, U.S. __, 119 S. Ct. 1849, 1859 (1999) (Petitioner is denied due process when the standard of prohibited conduct is uncertain).

The court of appeals decision is also legally untenable, because the court improperly relied upon criminal cases in which the issue was prosecutorial misconduct to reverse the judgment. App. A at 9a-10a. In criminal cases, the courts apply a harmless error test to determine "whether it is more probable than not that the prosecutor's misconduct materially affected the fairness of the trial." *United States v. McKoy*, 771 F.2d 1207, 1212 (9th Cir. 1985). Put another way, in criminal cases the issue is whether the conduct, considered in the context of the entire trial, appears likely to have affected the "jury's ability to judge the evidence fairly." *United States v. Young*, 470 U.S. 1, 12 (1984). This standard for prosecutorial misconduct is clearly less stringent than the standard for attorney misconduct in civil cases, because there is more at stake in a criminal case and it is more difficult for the court to determine whether the verdict was prejudiced by a prosecutor's misconduct.

Because of the less stringent criminal standard, the court's reliance on criminal cases is misplaced. In a criminal case, a prosecutor, as a representative of the United States, does not speak as a "mere partisan." *United States v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998), *amended by* 170 F.3d 881 (9th Cir. 1999). Thus, when the last thing a jury hears before beginning its deliberations is the improper remarks of a prosecutor, those remarks "cannot fail to leave an imprint on the jurors' minds." *Id.* Counsel's remarks during closing argument in a civil case simply do not have the same persuasive impact on a jury. Consequently, the court of appeals improperly relied upon criminal cases to support its determination that the alleged misconduct was unfairly prejudicial.

Finally, the court of appeals decision is improper, because the relief granted to Respondent far exceeds the relief requested on appeal. At no time did Respondent ask the court to order a new trial on the jury's finding of liability or compensatory damages. Respondent only asked for a new trial on the jury's findings that it acted with malice and oppression on the ground that those verdicts were inconsistent with the jury's finding on Petitioner's claim for intentional infliction of emotional distress. Nor did Respondent ever argue that there was insufficient evidence to support the jury's finding of malice and oppression. It is clearly improper for the Ninth Circuit to grant relief beyond that sought by Respondent, without giving Petitioner notice and an opportunity to be heard. Under the circumstances, the court ignored fundamental notions of fairness and justice and, as a result, its decision is erroneous. The Court should invoke its authority to supervise the federal judiciary to right the wrong perpetrated by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 3, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16769

D.C. No. CV-93-02088-SBA

DAVID HERN,

Plaintiff-Appellee,

v.

INTERMEDICS, INC., a Delaware corporation,

Defendant-Appellant.

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California,
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted January 10, 2000
San Francisco, California

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appendix A

Before: VAN GRAAFEILAND,[2] ALARCÓN, and SILVERMAN, Circuit Judges.

Intermedics, Inc., appeals from the judgment entered, following a trial by jury, awarding $1,550,000 in punitive damages to David Hern, and the denial of its motion for a new trial. Intermedics seeks reversal on four discrete grounds. First, Intermedics contends that Hern's counsel engaged in prejudicial misconduct that compels reversal of the judgment. Second, Intermedics argues that it should have been permitted to argue to the jury that it should apportion fault to Kaiser-Cadillac Hospital in Los Angeles ("Kaiser") for Hern's injuries. Third, Intermedics asserts that the jury's finding that Intermedics did not engage in extreme and outrageous conduct was fatally inconsistent with its finding that Intermedics acted with malice. Finally, Intermedics maintains that the punitive damages award was excessive. Both of the parties are familiar with the evidence presented to the jury. Accordingly, we will not summarize them in this unpublished disposition.

We vacate the judgment and remand because we conclude that the district court erred in precluding Intermedics from requesting that the jury apportion liability. We also hold that Hern's counsel committed prejudicial misconduct when she referred to evidence outside of the record during her closing argument.

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2. Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge, for the Second Circuit, sitting by designation.

Appendix A

I

On June 2, 1993, Hern filed an action in state court for product defect, fraud, negligence, intentional infliction of emotional distress and breach of warranty. The action was removed to federal court pursuant to its diversity jurisdiction. The jury found for Hern on the product liability, negligence and breach of warranty claims. The jury awarded Hern $90,886.93 in compensatory damages and $1,550,000 in punitive damages. The district court entered judgment on March 5, 1997. On March 20, 1997, Intermedics filed a motion for judgment as a matter of law or for a new trial. On August 13, 1998, the district court denied Intermedics' motions. Intermedics timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

Intermedics contends that we should reverse the judgment because Hern's counsel engaged in prejudicial misconduct. We review for abuse of discretion, the denial of a motion for a new trial for prejudicial misconduct of counsel. *See McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 359 (9th Cir. 1996). We recognize that the district court "is in a superior position to gauge the prejudicial impact of counsel's conduct during the trial." *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995). We therefore, "will not disturb the district court's ruling unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached." *Id.* (internal quotations and citation omitted).

Appendix A

Intermedics argues that Hern's counsel committed prejudicial error in her closing argument to the jury. Hern's counsel argued as follows:

> Now, the defendants tell you that there is no evidence in this record that anybody else was injured or anybody else died. Ladies and Gentlemen, that's because we could not prove that. Not because the evidence didn't exist, but because the evidence was irrelevant to the injuries of David Hern.

The district court overruled Intermedics's objection. Hern's counsel then compounded this misconduct by making the following argument to the jury:

> If we had tried to introduce evidence that others were injured, it would have been excluded because it's irrelevant to the causes of action at issue in this case. Now, with that said, we cannot be held to prove something that we could not prove, not because the evidence doesn't exist, but because we would never be allowed to present it to you.

Intermedics further contends that the district court not only failed to remedy this misconduct, but, instead, exacerbated the prejudicial effects of counsel's prejudicial statements in its limiting instruction. The district court instructed the jury as follows:

> [I]t's important that the jury understand that you must disregard the argument with respect to

> whether or not there is any such evidence that exists, so to the extent that you're interpreting that as suggesting that evidence does or does not exist, you don't have any evidence either way. So I just want to make sure that's clear, there is no evidence either way that evidence does exist or evidence does not exist.

Following the court's admonition, Hern's counsel argued as follows:

> Thank you, your honor. And I think that's a very important instruction. As much as defendant would like to use it against us, that the evidence isn't in the record, the fact that it's not in the record cannot be used to suggest that there were not, in fact, other injuries or deaths.

In its motion for judgment as a matter of law, or for a new trial, Intermedics argued that the net effect of Hern's counsel and the district court's instruction was prejudicial. In denying Intermedics' motion, the district court reasoned that Intermedics had "waived its contention that plaintiff's argument in tandem with the court's *sua sponte* instruction were sufficiently prejudicial" by failing to interpose a timely objection.

Intermedics maintains that it did not waive its argument that Hern's counsel's statements in her closing argument were improper. Intermedics objected immediately after Hern's counsel made the first remark regarding the existence of evidence of serious injuries and deaths. Intermedics asserts

that its objection was sufficient to preserve its contention that the references to facts that were not in evidence constituted prejudicial misconduct. Hern appears to concede that Intermedics preserved its contention regarding the first remark, but argues that Intermedics waived its contentions regarding the subsequent remarks because it did not renew its objection.

We have previously held that a party should object to alleged instances of attorney misconduct before the jury deliberates to allow the district court "to examine the alleged prejudice and to admonish [ ] counsel or issue a curative instruction, if warranted." *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.*, 785 F.2d 656, 658 (9th Cir. 1986). Absent an explanation for the failure to object, the failure to make a contemporaneous objection "firmly bars relief for misconduct." *See id.* In *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283 (9th Cir. 1984), we affirmed the district court's denial of a motion for a new trial, in part because opposing counsel did not object to the alleged misconduct during closing argument or move for a mistrial. *Id.* at 1286. We recognized, however, that "constant objections are certainly not required, as they could antagonize the jury." *Id.* (citation omitted); *see also Evalt v. United States*, 359 F.2d 534, 542 (9th Cir. 1966) (holding that party did not have to repeat objection to the testimony of a witness where party earlier objected unsuccessfully to the admission of the same evidence through the testimony of a previous witness). We agree with Intermedics that its timely objection to the argument of Hern's lawyer was sufficient to preserve the issue for appeal.

Appendix A

During the liability phase of the trial, Hern attempted to introduce evidence of Medical Device Reports ("MDR") that Intermedics filed with the FDA regarding serious injuries resulting from failed batteries. Intermedics objected on the ground that the MDR reports contained hearsay and that any probative value of the evidence was substantially outweighed by unfair prejudice.

Hern asserts that his counsel's statements that she was not allowed to present evidence were not false because the court sustained an objection to the admission of reports that other persons had suffered serious injury or died as the result of using a defective pacemaker produced by Intermedics. The record shows, however, that Intermedic's objection was sustained by the district court "for purposes of the liability phase of the trial." The court did not rule that the reports would not be admitted to prove punitive damages. To the contrary, the court stated: "Defendant may renew its objection to these exhibits if this matter proceeds to a determination of the amount of punitive damages." Hern's counsel did not offer the hearsay reports during the punitive damages phase of the trial. Thus, counsel's comment that "[i]f we had tried to introduce evidence that others were injured, it would have been excluded" misrepresented the court's order. The court did not rule that the reports would not be admitted on the issue of punitive damages. Instead, it merely advised Intermedics that it could renew its objection if the reports were offered in the damages phase of the trial.

Even if we assume that Hern's counsel did not intend to mislead the jury regarding the court's ruling on the admissibility of the reports that other persons suffered serious

injury or died as a result of using Intermedics's pacemaker, her reference to evidence outside of the record constituted misconduct. Counsel's argument that others who used the defective pacemaker suffered serious injury or died denied to Intermedics its right to a fair trial on the issue of punitive damages.

It is a "well-settled rule that it is improper in closing argument to make reference, over objection, to matters not in evidence." *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 860 (9th Cir. 1978) (as amended) (citation omitted). We have expressed concern that such tactics allow counsel to bring facts before the jury at a time when opposing counsel no longer has the opportunity to present explanatory evidence. *See id.*; *see also Anheuser-Busch*, 69 F.3d at 347 (holding that counsel impermissibly referenced matters previously ruled inadmissible, leaving the opposing party in the untenable position of being unable to rebut the inference). Furthermore, in *County of Maricopa v. Maberry*, 555 F.2d 207 (9th Cir. 1977), we held that it was impermissible for counsel to place a statement before the jury that encouraged speculation as to what was purposely being kept from them. *Id.* at 217-18.

The suggestion that evidence not presented to the jury demonstrates that Intermedics's pacemaker caused others to suffer serious injury or death was made immediately prior to the commencement of its deliberations. Because counsel's remarks were made during Hern's closing argument, Intermedics was not able to present evidence to rebut a highly prejudicial albeit impermissible inference that Hern was entitled to punitive damages because Intermedics had caused others to die.

Hern contends that the comments did not constitute misconduct because they were invited by improper statements by counsel for Intermedics. Intermedics's attorney stated during closing argument:

> The testimony is that there has never been any death due to this premature battery failure problem that they are accusing us of having in Mr. Hern's pacemaker. There has never been any evidence of any serious injuries due to premature battery failure. Believe me, Ladies and Gentlemen, if they had such evidence they certainly would have presented it here to you, and they have not done so. And that's because that just doesn't happen in real life with people who have pacers.

Hern argues that it is untrue that there had never been any evidence of serious injuries resulting from the battery failures because Intermedics's own witness testified that Intermedics had filed three or four reports of serious injuries with the FDA.

In *United States v. McKoy*, 771 F.2d 1207 (9th Cir. 1985), we held that an attorney is "not entitled to use improper tactics in response to the tactics of defense counsel." *Id.* at 1212 (citing *United States v. Young*, 470 U.S. 1, 12 (1985)). In *Young*, the Supreme Court instructed that "the issue is not the [attorney's] license to make otherwise improper arguments, but whether the [attorney's] 'invited response,' taken in context, unfairly prejudiced the defendant." 470 U.S. at 12. Hern's counsel's remarks were inexcusably improper. We must, therefore, consider whether they unfairly prejudiced Intermedics.

"Improprieties in counsel's arguments to the jury do not constitute reversible error unless they prejudice the defendant and that prejudice has not been remedied by the trial judge." *McClaran*, 97 F.3d at 359-60 (quoting *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992)). "[T]he flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379, 388 (9th Cir. 1965).

Hern's counsel's improper statements were prejudicial. Though they occurred only at the end of the trial, and not throughout the entire trial, *see Kehr*, 736, F.2d at 1286, the statements left the jury with a final impression that serious information had been kept from it at trial. *See County of Maricopa*, 555 F.2d at 217-219 (holding that the impression left on the jury from counsel's statement, which encouraged the jury to speculate as to what was purposely kept from it, was clearly prejudicial to a fair trial). The statements were one of the last things the jury heard before deliberating. *See United States v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998) (holding that the trial process was distorted where the prosecutor's improper statement was the last thing the jurors heard before they went home for the night before they were to decide the case), *amended by* 170 F.3d 881 (9th Cir. 1999). At that point, Intermedics was unable to refute Hern's counsel's improper argument by presenting evidence that no one had died as a result of a defect in its pacemakers. *See Anheuser-Busch*, 69 F.3d at 347 (finding prejudice where defendant's counsel introduced evidence that had been ruled inadmissible and the plaintiff did not have an opportunity to rebut the evidence).

Hern's counsel's remarks were particularly prejudicial because she requested the jury to award punitive damages based on the reprehensibility of Intermedics's conduct. We are persuaded that the jury was influenced by counsel's misconduct.

The district court's attempt to address the misconduct by giving a limiting instruction did not adequately remove the prejudicial effect of Hern's counsel's statements. The district court's limiting instruction left open for the jury the inference that Intermedics's pacemakers had caused people to die because the district court stated to the jury that there was no evidence either way. It also left with the jury the impression that evidence had been purposely kept from it. *See County of Maricopa*, 555 F.2d at 217-218 (holding that statement encouraging the jury to speculate upon what was purposely being kept from them was error, and that "any impression it made upon the jury could not be wiped out by an ordinary instruction to disregard it."). Furthermore, the district court did not address the fact that Hern's counsel not only referred to evidence outside the record, but also falsely implied that it had been ruled inadmissible to prove that Hern was entitled to punitive damages.

While it is true that a district court "is in a superior position to gauge the prejudicial impact of counsel's conduct during trial," *Anheuser-Busch*, 69 F.3d at 346, here, the district court did not make a finding as to the prejudicial effect of Hern's counsel's statement when it denied Intermedics's motion for a new trial. Rather, the district court determined that Intermedics failed to make a timely objection after the district court gave its limiting instruction. Thus,

the district court failed to consider the prejudicial impact of counsel's misconduct in suggesting that evidence that Intermedics caused people to die was kept from the jury. Because we have a definite and firm conviction that the district court committed a clear error in judgment in denying Intermedics's motion for a new trial, we must vacate the judgment.

III

To assist the court and counsel should this issue recur on remand, we also hold that Intermedics should have been permitted to argue to the jury that Kaiser's negligence caused Hern's injuries. We also hold that the district court abused its discretion in ruling that Intermedics was required to offer expert testimony to establish Kaiser's duty of care in order to present this theory to the jury.

At trial, before the jury was instructed, Hern moved for a directed verdict on Intermedics's "claim" that Kaiser was negligent in failing to notify Hern or his new physician of the safety alert, or to notify Intermedics that Hern had a new physician. The district court ruled that Intermedics could not argue to the jury that Kaiser was negligent, and that liability should be apportioned, because it had failed to introduce expert testimony. It ruled that Kaiser's alleged negligence could only have been established through expert testimony. Following trial, Intermedics filed a motion for a new trial on this basis. The district court denied the motion. The district court did not rely upon the reasoning of its earlier ruling, that expert testimony was necessary. Instead, the district court ruled that California's Proposition 51 does not apply

to strict liability claims. We review de novo a district court's determination of state law. *See Weyerhaeuser Co. v. Klamath County*, 151 F.3d 996, 998 (9th Cir. 1998).

Proposition 51 was enacted to establish a system of comparative fault in tort actions. *See* CAL. CIV. CODE § 1431.2; *see also DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 143-44 (Cal. 1992). Under Proposition 51, "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." Cal. Civ. Code § 1431.2(a). Proposition 51 has been interpreted to allow defendants to allocate fault to those responsible for plaintiffs' injuries even if those responsible were not joined as defendants. *See DaFonte*, 828 P.2d at 146. Proposition 51 has also been interpreted to allow a jury to allocate liability between a strict liability defendant and a negligent third person or entity. *See Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 332 (1978).

Where a defendant fails to introduce any evidence that others are responsible for the damages, a district court may properly conclude that a strictly liable defendant may not allocate fault pursuant to Proposition 51. *See Kellogg v. Asbestos Corp.*, 41 Cal. App. 4th 1397, 1408 (1996). The district court ruled that Intermedics did not introduce sufficient evidence to come within Proposition 51 because it was required to introduce expert testimony in order to establish Kaiser's standard of care as a medical facility. "[A] hospital's business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary

prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof." *Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 884 P.2d 142, 145 (Cal. 1994) (internal quotations and citation omitted). Typically, a defendant must introduce expert testimony to establish the standard of care against which the acts of medical professionals are to be measured. *See id.* at 147.

There is, however, an exception to the requirement that a defendant produce expert testimony regarding a medical professional's standard of care. A defendant need not introduce expert testimony if the conduct to be evaluated is within the common knowledge of the layperson. *See id.* Expert testimony is not required under these circumstances because "the jury is capable of appreciating and evaluating the significance of a particular medical event." *Gannon v. Elliot*, 19 Cal. App. 4th 1, 7 (1993) (citation omitted). In such cases, scientific or technical knowledge is not required to determine whether a medical professional met his duty of care. *See id.*

In this case, whether Kaiser was negligent in failing to warn Hern regarding a defective medical device does not require an understanding of scientific or technical information. A layperson is capable of evaluating whether Kaiser's failure to warn Hern was negligent.

Hern argues that Intermedics's own witnesses admitted that a physician must exercise independent judgment in determining his course of action after receiving a medical alert. Intermedics's witnesses, however, were referring to

the physician's judgment in deciding whether a patient should undergo surgery to explant a faulty pacemaker or how often the patient should be monitored. This is a different question from whether a hospital should warn a patient of the potential injury that may result if the pacemaker contains a defective battery. The district court abused its discretion in ruling that Intermedics was required to produce expert testimony in order to argue that Kaiser's conduct was negligent.

CONCLUSION

Because the district court erred in precluding Intermedics from arguing that Kaiser was liable to Hern for its negligence in failing to warn him regarding a possible defect in his pacemaker, we must vacate the judgment that Intermedics was liable for Hern's injuries. The award of damages must also be vacated because of the prejudicial misconduct of Hern's counsel.

VACATED and REMANDED. Each party shall bear its own costs.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT *OF CALIFORNIA DENYING DEFENDANT'S MOTION* FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY MOTION FOR A NEW TRIAL DATED AND FILED AUGUST 11, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93-2088 SBA

DAVID HERN,

Plaintiff,

vs.

INTERMEDICS, INC. , a Delaware Corporation, and JOHN GARCIA, an individual,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY MOTION FOR A NEW TRIAL

Plaintiff, David Hern, brought this diversity jurisdiction products liability action against Intermedics, Inc. ("Intermedics"), and its president John Garcia. This matter was tried to a jury which awarded plaintiff $90,886.93 in compensatory damages, and $1,550,000.00 in punitive damages against Intermedics. The parties are presently before the Court on Intermedics' Post Trial Motion for Judgment

as a Matter of Law, or Alternatively, Motion for New Trial. Having read and considered the papers filed in connection with this matter, and being fully informed, the Court denies Intermedics' motion in its entirety.[1]

BACKGROUND

In 1988, plaintiff was implanted with a pacemaker manufactured by Intermedics. On June 20, 1992, plaintiff's pacemaker battery failed, and the pacemaker was surgically removed. On June 2, 1993, plaintiff commenced the instant lawsuit against Intermedics and Garcia. The Complaint alleged state law causes of action for strict products liability, fraud by concealment, negligence, intentional infliction of emotional distress ("IIED"), and breach of express warranty. Intermedics was named as a defendant in all causes of action, while Garcia was included only in the fraud by concealment and IIED claims.

On September 29, 1995, the Court summarily adjudicated the claims against Garcia in his favor. The Court also granted summary judgment in favor of Intermedics on all causes of action except breach of warranty. However, after the United States Supreme Court's decision in *Medtronic, Inc. v. Lohr*, __ U.S. __, 116 S.Ct. 2256 (1996) and the Ninth Circuit's decision in *Kennedy v. Collagen Corp.*, 67 F.3d 1453 (9th Cir. 1995), the Court reconsidered its ruling with respect to Intermedics and reinstated all causes of action. The matter was then scheduled for a jury trial.

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1. Pursuant to Civil Local Rule 7-1(b), the Court adjudicates the instant motion without oral argument.

Appendix B

The action was tried to a jury during January through March 1997. The Court bifurcated the trial on the issues of liability and punitive damages.[2] On February 6, 1997, at the close of plaintiff's case-in-chief, Intermedics moved for a directed verdict on plaintiff's claims for fraud, IIED, and punitive damages. (RT 2/6/97 at 948:8-12, 965:3-17.) The Court took the motion under advisement.

On February 7, 1997, the Court denied Intermedics' motion for directed verdict and the defense began its case. On February 12, 1997, the defense rested. (RT 2/12/97 at 114:7-8.) On February 13, 1997, Intermedics renewed its motion for directed verdict on plaintiff's fraud and IIED claims and also moved for a directed verdict on plaintiff's breach of warranty claim. (*Id.* 2/13/97 at 1684:17-20.) The Court denied the motion in its entirety. (*Id.* at 1690:13.) The Court instructed the jury.

On February 18, 1997, the jury returned a unanimous verdict in favor of the plaintiff on his causes of action for strict products liability, negligence and breach of express warranty. The jury returned a unanimous verdict for Intermedics on plaintiff's claims for fraud by concealment and IIED. The jury awarded plaintiff $90,886.93 in compensatory damages. (RT 2/18/97 at 1949:8-1954:3.) Of

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2. The Court bifurcated the presentation of the liability and punitive damages evidence during the trial such that plaintiff could not present evidence of or refer to defendant's profits and financial condition unless and until the jury returned a verdict for plaintiff awarding actual damages and found that the defendant was guilty of malice, oppression or fraud in accordance with California Civil Code § 3294. (Order Re Mots. in Limine at 15-16.)

this amount, $15,000.00 represented damages on the breach of warranty claim; the remainder was attributable to the strict liability and negligence causes of action. Intermedics did not object to the verdict at the time it was read.[3] The Court continued the case to February 24, 1997 for the punitive damages phase of the trial. (*Id.* at 1963:7-8.)

The parties returned to Court on February 24, 1997. At that time, Intermedics raised a new objection to plaintiff's exhibit (no. 132) concerning Intermedics' net worth. Although defendant's objection was untimely, the Court determined that the defect with respect to plaintiff's proposed exhibit could not be waived. (RT 2/24/97 at 2008:2-5.) Plaintiff then withdrew the exhibit. (*Id.* at 2008:21, 2009:13-22.) However, because counsel for Intermedics' eleventh hour argument placed plaintiff at an unfair disadvantage, the Court granted plaintiff's request for a brief continuance to conduct discovery on the issue punitive damages. (*Id.* at 2016:23-2017:7.) The Court continued the matter to March 3, 1997. (*Id.* at 2027:21-22.)[4]

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3. After the jury rendered its verdict, Intermedics stated that it had a "problem" with the verdict because "you can't find punitive damages on negligence and strict liability." (*Id.* at 1956:4-5.) However, defense counsel stated that "that may have to be a subsequent motion" and the proceedings continued without further discussion of the matter. (*Id.* at 1956:7-8.)

4. Intermedics' decision to object to plaintiff's Exhibit 132 at the last minute was apparently a strategic one. As soon as it became apparent that the exhibit would not be allowed, Intermedics produced to the Court a *written* motion for directed verdict and a separate opposition to plaintiff's motion for a continuance to conduct

(Cont'd)

Appendix B

On March 3, 1997, trial resumed and plaintiff presented his evidence relevant to punitive damages. Intermedics also submitted evidence to the jury and rested. (RT 3/3/97 at 18:10.) Although all evidence had then been submitted to the jury, Intermedics did not bring any motion pursuant to Rule 50. Instead, after the defense rested, the parties presented their closing arguments and the Court instructed the jury. (*Id.* at 18:13-54:1.) Later that afternoon, the jury rendered a punitive damage verdict in the amount of $1,550,000.00 against Intermedics. On March 6, 1997, the Court entered judgment in accordance with the jury's verdicts.

Pursuant to Federal Rules of Civil Procedure 50 and 59, Intermedics now moves for judgment as a matter of law, or alternatively, for a new trial with respect to the award of punitive and compensatory damages.[5] Intermedics also moves for entry of judgment on the claim for breach of express warranty. Plaintiff opposes the motion.

(Cont'd)
additional discovery. Thus, it was readily apparent that Intermedics was hoping to "ambush" plaintiff by seeking the exclusion of his only evidence concerning Intermedics' net worth, and then moving for a directed verdict on that basis. However, the Court rejected Intermedics' tactics and permitted plaintiff additional time to discover evidence relevant to punitive damages.

5. The arguments presented in support of these motions are identical.

Appendix B

DISCUSSION

A. *RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW*

1. *Legal Standard*

Motions for judgment as a matter of law are governed by Rule 50. *See Central Office Tel., Inc. v. Am. Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir. 1997), *reversed on other grounds*, 118 S.Ct. 1956 (1998). Rule 50(b) provides, in relevant part, as follows:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence . . . [t]he movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for new trial under Rule 59.

Fed. R. Civ. Proc. 50(b). Under Rule 50, the district court has the option of permitting the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. Fed. R. Civ. P. 50(b)(1).

"Judgment as a matter of law is proper if the evidence, construed in a light most favorable to the non-moving party, allows only one reasonable conclusion and that conclusion is contrary to that reached by the jury." *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert.*

denied, 117 S.Ct. 514 (1996). In other words, the movant must demonstrate that, "without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion." *Baker v. Delta Air Lines*, 6 F.3d 632, 644 (9th Cir. 1993) (internal quotations and citations omitted).

2. *Preservation of Issues*

The threshold question presented with respect to Intermedics' motion for judgment as a matter of law is whether the motion is properly before the Court. In order to preserve issues for presentation in a post-trial Rule 50 motion, the movant must have raised by way of a pre-verdict motion the same grounds which support the post-trial motion. Fed. R. Civ. 50(b), Advisory Notes; *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990) ("a district court may not enter a JNOV on grounds not asserted in a party's motion for directed verdict"). In addition, the movant *must* raise those issues in a motion for judgment as a matter of law "at the close of *all* the evidence . . . ." Fed. R. Civ. P. 50(b) (emphasis added).

The failure to bring a Rule 50 motion at the close of all evidence precludes a party from doing so after trial. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1459 (9th Cir. 1988) (holding that defendants waived challenges to sufficiency of the evidence by failing to present their arguments in a directed verdict motion made at the close of the evidence). "[T]he requirement that the motion be made at the close of all the evidence is strictly observed." *Farley Transportation Co. v. Santa Fe Transportation Co.*, 786 F.2d

1342, 1346 (9th Cir. 1985).[6] The purpose of strictly applying Rule 50(b) "obviates the necessity for a case-by-case determination of whether a failure to renew a motion for directed verdict at the close of all the evidence has resulted in such prejudice to the opposing party under the particular circumstances of that case." *Id.* Indeed, the Ninth Circuit has counseled that a district court should not entertain the merits of a Rule 50 motion which has been waived. *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1988).

There are only two recognized exceptions to the above rule: (1) where an earlier motion for judgment as a matter of law has been taken under advisement by the trial court; and (2) an "ambiguous or inartful" motion or request is made at the close of the evidence which sufficiently approximates a motion for judgment as a matter of law. *See Herrington*, 834 F.2d at 1500 (citation omitted). Where these exceptions are inapplicable and a defendant fails to renew its motion for judgment as a matter of law at the close of all evidence, the defendant is precluded from challenging the sufficiency of the evidence by way of Rule 50. *Id.*; *see also Murphy*, 914 F.2d at 186 (finding that directed verdict motion made at close of compensatory damages phase of trial but prior to punitive damages phase did not comport with Rule 50(b)'s requirement that the motion be made at the close of all evidence).

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6. Although Rule 50(b) was amended subsequent to *Farley*, the changes do not effect the application of *Farley* to the instant motion. *See Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996).

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In the instant case, plaintiff contends that Intermedics is precluded from bringing a motion for judgment as a matter of law because it failed to make a motion for directed verdict or other motion under the auspices of Rule 50 at the close of *all* the evidence. The Court agrees. The record confirms that after the final presentation of evidence on March 3, 1997, Intermedics made no motion under Rule 50 or any other motion or request which approximated such a motion. (RT 3/3/97 at 18:10-22.)[7]

Intermedics does not dispute that it did not present a motion for directed verdict at the close of all the evidence. Rather, Intermedics now asserts that it "is *not* raising these issues in its motion under Rule 50(b)." (Def.'s Reply at 5 (emphasis added).) Because Intermedics may only raise issues in the instant motion that were raised in its motion for a directed verdict, the Court construes a waiver of these issues as a waiver of the right to bring the motion. Therefore, the Court denies Intermedics' motion for judgment as a matter of law and reviews the motion solely as one for a new trial.[8]

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7. Intermedics' motion for directed verdict on February 12, 1997, made after the close of evidence on the first phase of trial, pertained only to plaintiff's causes of action for fraud, IIED, and breach of express warranty. The motion did not include any challenge to plaintiff's request for punitive damages. Thus, assuming *arguendo* that the "close of all the evidence" refers to the close of evidence with respect to the first phase of trial, the *only* conceivable challenge which was preserved was with respect to the claim for breach of express warranty. However, the basis for Intermedics' challenge to the breach of warranty claim was that it made no representation concerning the life of the pacemaker battery and elective replacement indicator. (RT 2/13/97 at 1687:11-1688:22.)

8. Intermedics also appears to suggest that the Court's granting of plaintiff's Rule 50 motion at the close of evidence in the

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B. *RULE 59 MOTION FOR NEW TRIAL*

1. *Legal Standard*

Under Federal Rule of Civil Procedure 59, a district court has the discretion to grant a motion for a new trial on all or part of the issues where appropriate. Fed. R. Civ. Proc. 59. A motion for new trial based on the insufficiency of the evidence must satisfy a "stringent" test: the movant must demonstrate that "the verdict is against the 'great weight' of the evidence or 'it is quite clear that the jury has reach a seriously erroneous result.' " *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987).

Unlike a Rule 50 motion, the court "can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes Construction Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). However, the jury's verdict is presumed correct. *Id.* The decision of whether to grant a new trial is a matter of the

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compensatory damages phase of the trial on the issue of Kaiser and CRC's negligence obviated the need for Intermedics to make a Rule 50 motion at the close of all of the evidence. (Def.'s Reply at 5.) Intermedics cites no authority in support of this argument. Moreover, this argument is contrary to the Ninth Circuit's well established rule requiring strict adherence to the literal terms of Rule 50. *See Johnson v. Armored Transport of Cal., Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987) (rejecting defendant's argument that it need not renew its motion for directed verdict because doing so "could not have conceivably changed the court's [prior] decision").

district court's discretion. *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 36 (1980) (stating that the grant of a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court").

2. *Punitive Damage Issues*

a. *Learned Intermediary Instruction*

Shortly before the jury was to be instructed, Intermedics submitted a supplemental jury instruction to the effect that the "Learned Intermediary" doctrine is a complete defense to plaintiff's negligence claim. The doctrine provides that a drug or medical device manufacturer's *duty to warn* runs only to the prescribing physician and not to the ultimate consumer. *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332, 1348 n.11 (C.D. Cal. 1987) (citing *Stevens v. Parke, Davis & Co.*, 9 Cal.3d 51, 65 (1973)). Thus, a manufacturer cannot be held liable if it has (1) provided appropriate warnings and (2) the doctor fails in his or her duty to transmit these warnings to the patient. *Plenger v. Alza Corp.*, 11 Cal. App. 4th 349, 358 (1992).[9]

In its motion for new trial, Intermedics contends that "[o]ne of Plaintiff's principal claims for punitive damages was [Intermedic's] alleged failure to inform Plaintiff of the 1991 Safety Alert." (Def.'s Mot. at 3.) Intermedics further asserts that in the absence of a learned intermediary

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9. The rationale underlying this rule is that the physician is in a better position than the manufacturer to weigh the risks and benefits of a drug or medical device to the patient. *See Nichols v. McNeilab, Inc.*, 850 F. Supp. 562, 564 (E.D. Mich. 1993).

instruction, plaintiff "was able to impose a duty on [Intermedics] which it did not have and then based a significant part of his negligence and punitive damages claims on breach of that non-existent duty." (*Id.* at 4.)

The factual basis for Intermedics' argument is entirely unclear. Intermedics provides no citation to any portion of the record in support of the proposition that plaintiff predicated his claim largely on the allegation that Intermedics failed to notify him of the 1991 Safety Alert. *See Raymo v. Textron, Inc.*, 846 F. Supp. 203, 206 (N.D.N.Y. 1994) (denying motion for new trial based on error in jury instructions where movant failed to provide necessary records to review the issue), *aff'd*, 89 F.3d 826 (2d Cir. 1995). Indeed, the Court's review of the record reveals that plaintiff's punitive damages claim was not based significantly on the 1991 Safety Alert.

Aside from Intermedics' failure to properly support its argument, Intermedics ignores the basis of the Court's decision to decline to give a learned intermediary instruction. (RT 2/13/97 at 1676:21-1677:3.) As the Court explained, plaintiff's negligence claim was *not* based on a failure to warn. In fact, counsel for Intermedics readily acknowledged that no failure to warn claim — either under the guise of strict liability or negligence — was pleaded in the Complaint. (*Id.* at 1682:4-11.) Rather, the Complaint alleged that Intermedics' acted negligently in handling the recall process. (*Id.* at 1676:21-1677:18; Compl. ¶ 35.) Intermedics' motion for a new trial presents no argument, evidence or authority which would cause the Court to reconsider its prior ruling.

Moreover, even if the Court erred in declining to give an instruction on the learned intermediary doctrine, a new trial is unnecessary. Plaintiff prevailed on his strict liability claim which was based exclusively on a *manufacturing defect* theory.[10] (Compl. ¶ 19.) This fact is important because the learned intermediary defense applies only to strict liability claims predicated on *inadequate warnings*. *Brown v. Superior Court*, 44 Cal.3d 1049, 1061 (1988). Because plaintiff prevailed on his strict liability manufacturing defect claim, any error resulting from the failure to instruct the jury on the learned intermediary defense was harmless.[11]

b. *Prejudicial Argument of Plaintiff's Counsel*

During closing argument at the end of the punitive damages phase of trial, plaintiff's counsel stated that:

> Now, Intermedics would love for you to believe that you may only consider David Hern's injury, but the fact of the matter is that there were many, many more people that were placed at risk because of the despicable conduct of the defendant.

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10. Strict liability applies to three types of product defects: "manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 994-95 (1991) (discussing principles of strict liability).

11. Moreover, upon review of the closing argument of plaintiff's counsel at the punitive damages phase of trial, the Court finds no reference to the 1991 Safety Alert.

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> Now, the defendants tell you that there is no evidence that anybody else was ever injured or anybody else died. Ladies and gentlemen, that's because we could not prove that. Not because the evidence didn't exist, but because the evidence was irrelevant to the injuries of David Hern.

(RT 3/3/97 at 48:15-19.) Shortly after plaintiff's counsel made the above statement, the Court *sua sponte* stated as follows:

> Excuse me, let me just say something before you finish. I know you're summing up. The argument that counsel has made — I'm going to read actually.
>
> > Now, the defendants tell you that there is no evidence in this record that anybody else was injured or anybody else died. Ladies and gentlemen, that's because we could not prove that, not because the evidence didn't exist, but because the evidence was irrelevant to the injuries of David Hern.
>
> I do think it's important that the jury understand that you must disregard the argument with respect to whether or not there is any such evidence that exists, so to the extent that you're interpreting that as suggesting that evidence does or does not exist, you don't have any evidence either way. So I just want to make sure that's clear, there is no evidence

> either way that evidence does exist or evidence does not exist.
>
> Okay, you may continue.

(*Id.* at 50:13-21.) Intermedics did not object to the Court's instruction.

Intermedics now asserts that the undisputed facts demonstrated that there were no serious injuries or deaths resulting from premature battery failure. Thus, Intermedics asserts that "[t]he net effect of Counsel's argument and the Court's ruling was to eliminate from the jury's consideration the most powerful evidence against Plaintiff's position — that [Intermedics] did not expect any serious injuries or deaths by delaying notification until the cause of the problem was discovered, and there were no serious injuries or deaths." (Def.'s Mot. at 5.)

As an initial matter, by failing to interject a timely objection, Intermedics has waived its contention that plaintiff's argument in tandem with the Court's *sua sponte* instruction were sufficiently prejudicial to mandate a new trial. *United States v. Segnal*, 930 F.2d 1420, 1425 (9th Cir.) (holding that defendant's failure to object to the prosecutor's allegedly unconstitutional comment resulted in a waiver of the objection), *cert. denied*, 502 U.S. 908 (1991); *see also Phillipine Nat'l Oil Co. v. Garrett Corp.*, 724 F.2d 803, 806 (9th Cir. 1984) (denying motion for new trial on the ground that defendant waived challenges to verdict "when it failed to raise [its objection] at the time the verdict was read").

Notwithstanding Intermedics' waiver, the Court finds no substantive merit to Intermedics' contentions. Intermedics

asserts that premature battery failure is not life threatening and that the symptoms resulting from battery failure are minor. (Def.'s Mot. at 4.) Intermedics cites to no evidence in the record to support these contentions. Indeed, the only citation provided by Intermedics is to Dr. Gerrard's testimony at trial which related that as of March 1991, there had been no confirmed *deaths* due to CRC-910 overheating. (*Id.* at 5 (citing RT 2/12/97 at 60:19-22).) However, there was evidence presented that serious *injuries* had resulted from CRC-910 battery failures. (RT 2/10/97 at 1276:22-24.)

c. *Sufficiency of the Evidence*

Intermedics contends that it is entitled to judgment as a matter of law or a new trial on the issue of punitive damages because there is insufficient evidence to support such an award. However, since Intermedics did not move for judgment as a matter of law on the issue of punitive damages at the close of all the evidence, it has waived its right to challenge the sufficiency of the evidence. *Farley*, 786 F.2d at 1347. As such, Intermedics is limited to seeking a new trial. *Id.* A new trial is not warranted so long as there is "some evidence" to support the jury's verdict. *See Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1502 (9th Cir. 1986) (refusing to consider defendant's argument regarding the sufficiency of the evidence, and instead, affirming trial court's denial of motion for new trial where "the record contains some evidence in support of the . . . damage award, . . .").

In the instant case, evidence was presented, *inter alia*, that Intermedics: failed to take adequate steps to ascertain the cause of the battery malfunction; refused to recall the

pacemakers until ordered to do so by the Food and Drug Administration; disseminated misleading information regarding the battery problem; and sold over 5,000 pacemakers which it knew or should have known contained batteries which could malfunction. Since this evidence is more than sufficient to support a finding of punitive damages, it certainly meets the requisite "some evidence" standard. *E.g.*, *Sloman v. Tadlock*, 21 F.3d 1462, 1473 (9th Cir. 1994) (affirming damage award in case where defendants waived Rule 50(b) challenge and where there was not an "absolute absence of evidence" to support such a finding). During closing argument for the first phase of trial, plaintiff's counsel mentioned that Intermedics had sold millions of dollars worth of pacemakers. Defense counsel objected to this statement on the ground that it pertained to punitive damages and was therefore improper. Plaintiff's counsel responded that such information was not being offered for purposes of punitive damages, but rather, to establish a motive for defendant's fraudulent conduct. The Court overruled defense counsel's objections.

Intermedics now claims that plaintiff's counsel's comments were improper because "motive" is not an element of a fraud claim, and the reference was otherwise in contravention to the Court's *in limine* order which precluded plaintiff from presenting evidence of or referring to defendant's profits and financial condition, (*see* Order Re Motions In Limine at 15).[12] These contentions lack merit.

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12. Intermedics also asserts that "the numbers [plaintiff's counsel] threw out were based on sheer speculation." (Def.'s Mot. at 18.) Defendant did not object on this basis and therefore it is waived.

Although "motive" may not be a specific element of a cause of action for fraud, it is germane to proving fraudulent intent. *See In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 931 (9th Cir. 1993). The Court finds nothing improper with respect to plaintiff's counsel's comments.

d. *Amount of Punitive Damage Award*

In *BMW v. Gore*, the Supreme Court reaffirmed the principle that "punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition." 517 U.S. 559, 568 (1996). The court further stated that "[o]nly when an award can fairly be characterized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* Relevant considerations in assessing the amount of a punitive damage award include whether the defendant had fair notice that punitive damages could be imposed, the reprehensibility of defendant's conduct, the disparity in the punitive damage award as compared to the harm suffered, and the disparity of the award in comparison to awards in similar cases. *Id.* at 574-75; *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997).

Intermedics contends that it did not have fair notice that plaintiff was seeking punitive damages on his negligence and strict liability claims because there were no punitive damage allegations associated with them. This contention lacks merit. The prayer of the Complaint specified, without limitation, that plaintiff was seeking punitive damages. Moreover, no specific request for punitive damages was

necessary. Under Federal Rule of Civil Procedure 54(c), every final judgment "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. 54(c). The Ninth Circuit has held that Rule 54(c) applies to requests for punitive damages. *See Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1318-19 (9th Cir.) (rejecting claim of inadequate notice regarding punitive damages where the plaintiff's pretrial statement itemized the amount of punitive damages sought), *cert. denied*, 459 U.S. 859 (1982).[13] The Court therefore rejects Intermedics contention that it had no notice that plaintiff was seeking punitive damages.

Intermedics next argues that the 17:1 ratio of punitive damages as compared to compensatory damage is "grossly excessive" because "[t]here was no evidence that anyone died or was seriously injured as a result of the battery failure" and the only injury suffered by plaintiff was having "to get his pacemaker replaced sooner than anticipated." (Def.'s Mot. at 9.) Defendant fails to cite to any portion of the record to support these contentions — which are in any event inaccurate. Indeed, Intermedics' assertion that there is no evidence of serious injuries is contradicted by the testimony of Intermedic's witness, Dr. Stephenson, who testified that

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13. Intermedics' assertion that it was prejudiced in terms of pretrial and trial strategy strains credulity. In the parties' Joint Case Management Statements filed on September 20, 1993, and April 18, 1994, plaintiff indicates that he is seeking punitive damages — including a specific dollar amount — as a result of Intermedics' conduct. This also notified Defendant that plaintiff was seeking punitive damages on all of his claims.

serious injuries had resulted from CRC-910 battery failures. (RT 2/10/97 at 1276:22-24.)

As a corollary to the above argument, Intermedics asserts that no punitive damages should have been awarded because the FDA was aware of the pacemaker problem "and not only chose not to impose any penalties but pronounced itself satisfied with [Intermedics'] efforts to deal with the problem." (Def.'s Mot. at 10.) Evidently, Intermedics takes the position that since the FDA did not impose any fine, the jury should not have imposed punitive damages. Intermedics fails to cite to any portion of the record or provide any relevant legal authority in support of this argument. This alone is fatal to Intermedics' assertion. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst*, 854 F.2d 1538, 1545 (9th Cir. 1988) (briefs which do not set forth the parties' arguments and which are not supported by citations to authorities, statutes and the record are deemed waived). To the extent that Intermedics is attempting to raise the defense of preemption, that contention has previously been rejected by the Court and is therefore not a basis for a new trial. *See Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir.) (denying Rule 59 motion based on previously-considered arguments), *cert. denied*, 493 U.S. 868 (1989).

Finally, Intermedics asserts that the punitive damage award is inconsistent with California law. Under California law, punitive damage awards are evaluated based on the nature of the defendant's wrongdoing, the actual harm to the plaintiff, and the defendant's wealth. *Cates Construction, Inc. v. Talbot Partners*, 62 Cal. Rptr. 2d 548, 567 (1997) (citing cases). These standards are analogous to those applied under federal law. *Id.* (discussing *BMW*, *supra*).

The $1.55 million damage award is not excessive under California law. As discussed above, there was ample evidence presented to support such an award. The 17:1 ratio of punitive damages to compensatory damages is well within the range approved by the California Supreme Court. *See Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 928-29 (1978) (78:1); *Finney v. Lockhart*, 35 Cal. 2d 161, 165 (1950) (2000:1). In the context of products liability cases, ratios of 20:1 have been deemed acceptable. *See Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 968 (1983) (affirming punitive damage award in defective knee implant case). The Court finds that the punitive damage award is permissible under state law standards.

e. *Inconsistent Special Verdict*

Intermedics argues that the jury's determination that it acted with "malice" is inconsistent with the finding of no liability on the causes of action for intentional infliction of emotional distress and fraud. (Def.'s Mot. at 12.) The Court previously rejected this argument and Intermedics has cited no new authority or evidence which would cause the Court to reconsider its prior ruling. (RT 2/24/97 at 1968:6-1969:14.) The Court finds that the verdicts are consistent and that a new trial is not warranted.

2. *Liability and Damages Issues*

A court may order a new trial where the damages awarded by the jury were "grossly excessive or monstrous, clearly not supported by the evidence, or based on speculation or guesswork." *Los Angeles Memorial Coliseum Comm'n v.*

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National Football League, 791 F.2d 1356, 1360 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (internal quotations and citations omitted). Intermedics presents several arguments for a new trial with regard to plaintiff's compensatory damage award.

First, Intermedics asserts that Plaintiff improperly requested the jury to award damages for the cost of future therapy sessions over a five-year period. Intermedics argues that a new trial is required because there was no evidence to support plaintiff's argument that each therapy session would cost $100 per session. (Def.'s Mot. at 14.) While plaintiff tacitly concedes that he failed to present such evidence, the Court disagrees that such failure justifies a new trial. Moreover, Intermedics ignores the evidence presented that the plaintiff suffered substantial and debilitating psychological injury resulting from the failure of his pacemaker. (*E.g.*, RT 2/5/97 at 578:14-22; *Id.* 2/6/97 at 830:832:12.)

Second, Intermedics argues that the Court should disregard plaintiff's testimony regarding his "near death" experience in the emergency room on the date his pacemaker malfunctioned. (Def.'s Mot. at 14-15.) Intermedics claims that plaintiff's "near death" claim is unfounded in light of the emergency room records and the testimony of an emergency room physician. (*Id.*) This argument is unsupported, as Intermedics has failed to identify any portion of the trial transcript to support these contentions.

Third, Intermedics contends that the Court's refusal to allow it the opportunity to argue that Kaiser was negligent

was inconsistent with Proposition 51. Intermedics also avers that, under Proposition 51, it should have been allowed to argue that liability should be apportioned to CRC. (Def.'s Mot. at 16-17.) Proposition 51 (California's Fair Responsibility Act) abrogated the rule of joint and several liability for noneconomic damages and mandates that tortfeasors are liable in relation to their percentage of fault. Cal. Civ. Code §§ 1431.1-1431.5; *Martin v. United States*, 984 F.2d 1033, 1034 (9th Cir. 1993). However, Proposition 51 has no application with respect to a strict products liability claim. *Wimberly v. Derby Cycle Corp.*, 56 Cal. App. 4th 618, 633, 65 Cal. Rptr. 532, 534-535, 541 (1997).[14] Since plaintiff prevailed on his claim for strict liability, there is no need for a new trial on this basis.

3. *Breach of Express Warranty*

a. *Sufficiency of the Evidence*

Intermedics contends that there is insufficient evidence to support a finding that it breached an express warranty made to plaintiff. As discussed above, Intermedics has waived any challenge to the sufficiency of the evidence by virtue of its failure to make a Rule 50 motion at the close of all the evidence. But even if this issue were not waived, the Court finds that there is more than sufficient evidence to support the jury's verdict on the breach of express warranty claim.

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14. To the extent that Intermedics believed that Kaiser was responsible in whole or in part for plaintiff's injuries, it could have brought a third party action for contribution and/or indemnity. *Wimberly*, 65 Cal. Rptr. at 541.

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Intermedics contends that plaintiff's breach of express warranty claim is deficient because "[t]here was no statement, representation, or guarantee that it [the pacemaker] would last a certain number of years." (Def.'s Mot. at 19.) However, plaintiff's breach of express warranty claim is not based on representations that the pacemaker would last a *specific number* of years, rather, that the pacemaker was designed, tested, and manufactured to properly function during its operation in a safe and reliable manner. (Sanders Decl. Ex. I; Compl. ¶ 45.) Such a representation is sufficient to sustain a claim f or breach of express warranty. *See Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 887 (9th Cir. 1991) (representation that a park was a "safe cycling area"); *Keith v. Buchanan*, 173 Cal. App. 13, 22 (1985) ("carefully well-equipped and very seaworthy vessel"); *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986) ("product was effective, proper and safe for its intended use").

b. *Limitation on Recovery*

Next, Intermedics contends that under its Limited Warranty, any recovery for a malfunctioning pacemaker is the replacement with another Intermedics pacemaker plus a payment of up to $450.00 to cover the cost of any medical expenses not covered by insurance. (Def.'s Mot. at 20.) Intermedics further states that because plaintiff failed to prove that he had $450.00 in unreimbursed medical expenses, it is "entitled to judgment as a matter of law on the breach of warranty cause of action." (*Id.*) However, Intermedics cannot seek judgment as a matter of law because it waived its right to do so.[15]

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15. As noted, Intermedics did not move for a directed verdict at the close of all the evidence. In its motion for directed verdict

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Even absent such waiver, the Court finds Intermedics' argument factually and legally unsupported. First, Intermedics has not provided a copy of the Limited Warranty as an exhibit in support of the instant motion. Consequently, the Court is not in a position to evaluate the actual language which Intermedics contends limits its liability for damages. Second, the proposed limitation is unenforceable under California Commercial Code section 2719(3). Section 2719 reads:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. *Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable.* Limitation on consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable.

Cal. Com. Code §2729(3) (emphasis added). Since no evidence was presented to overcome the presumption that the $450.00 limitation is invalid, the Court finds that such limitation is unenforceable.

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made earlier in the trial on February 13, 1997, Intermedics did not argue that plaintiff's breach of warranty damages should be limited to $450.00. Therefore, Intermedics is foreclosed from now arguing that plaintiff's breach of warranty damages must be limited to $450.00. Fed. R. Civ. P. 50(b) (requiring motion for judgment as a matter of law to be based on the same grounds as those presented in the motion made at the close of all evidence).

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c. *Separate Recovery*

Intermedics argues that it was improper for the Court to permit the jury to award a separate amount for breach of express warranty.[16] Prior to finalizing the special verdict form, the Court engaged the parties in an extensive discussion regarding the contents of the special verdict form. (RT 2/13/97 at 1880:1-1885:14.) During this discussion, the Court *repeatedly* advised the parties that if they had any suggestions regarding the form, they should provide them to the Court. (*Id.* at 1882:12-15; 1883:18-21.) At no time during this discussion did Intermedics express any objection to the verdict form on the ground that it permitted the jury to award a separate amount for breach of express warranty.

Intermedics' only concern regarding the Special Verdict Form was that it potentially allowed the jury to duplicate the damage awards on each of the causes of action. (*Id.* at 1880:25-1881:1.) To accommodate this concern, the Court incorporated Intermedics' proposal to add a line at the bottom of the form to specify the "total" amount of damages to be awarded. (*Id.* at 1883:25-1885:2.) Neither party voiced any other concern regarding the verdict form. (*Id.* at 1885:9-14.) As a result, Intermedics has waived its objection to the Special Verdict Form. *See Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 889 (9th Cir. 1991) (holding that under Federal Rule of Civil Procedure 49(a), defendant waived

16. The Special Verdict Form provided to the jury, with the parties' approval, provided a space for a damage award with respect to each cause of action. At the bottom of the form, the jury was asked to specify the total amount of damages to be awarded. The purpose of this latter interrogatory was to avoid a duplicative award.

objection to the special verdict form by failing to raise such objection prior to the jury's deliberations); *Neely v. Club Med Management Servs., Inc.*, 63 F.3d 166, 200 (3rd Cir. 1995) ("where a defendant fails to object to the form and language of special verdict forms or jury charges, before closing arguments or at the close of charging before the jury retires to deliberations, and the form has been submitted to counsel, objections are waived") (citations omitted).

d. *Apportionment of Fault*

Intermedics also contends that plaintiff's damage award should have been apportioned in accordance with the principles of comparative fault. (Def.'s Mot. at 21.) For the reasons stated above, Intermedics waived this argument by failing to raise it before the jury retired. Furthermore, Intermedics fails to cite any authority to support its position. Indeed, California law does not recognize comparative fault as a defense to claims of breach of express warranty. *See Shaffer v. Debbas*, 17 Cal. App. 4th 33, 42 (1993) (refusing to apply comparative fault to damage award on breach of warranty claim).

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT Intermedics' Post Trial Motion for Judgment as a Matter of Law, or Alternatively, Motion for New Trial is DENIED.

Appendix B

IT IS SO ORDERED.

DATED: August 11, 1998.

s/ SB Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED MARCH 5, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93-2088 SBA

DAVID HERN,

Plaintiff,

vs.

INTERMEDICS, INC., a Delaware Corporation,

Defendant.

JUDGMENT

The above-captioned action came on regularly for trial in Courtroom 3 of the United States District Court for the Northern District of California. Plaintiff, David Hern, was represented by Lee Burdick and William K. Sanders of Prima Legal Services. Defendant, Intermedics, Inc., was represented by David W. Condeff and John G. Downing of Lillick & Charles.

A jury of seven persons was regularly impaneled and sworn. Witnesses were sworn and testified. After closing arguments, the Court duly instructed the jury and the cause was submitted thereon with directions to return verdicts on

the special verdict forms issued. After deliberating, the jury returned to court with a unanimous verdict in favor of the plaintiff on his causes of action for strict products liability, negligence and breach of express warranty. The jury returned a unanimous verdict for defendant on plaintiff's claims for fraud by concealment and intentional infliction of emotional distress. The jury unanimously determined that punitive damages shall be assessed against defendant. In accordance with the jury's verdicts,

IT IS HEREBY ORDERED THAT, pursuant to Federal Rule of Civil Procedure 58, final judgment is entered in favor of plaintiff on his causes of action for strict products liability, negligence and breach of express warranty. Final judgment is entered in favor of defendant on plaintiff's causes of action for fraud by concealment and intentional infliction of emotional distress.

IT IS FURTHER ORDERED THAT, in accordance with the jury's verdict, plaintiff shall have judgment in the amount of $90,886.93 in compensatory damages, and $1,550,000.00 in punitive damages.

IT IS SO ORDERED.

DATED: March 5, 1997

s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX D — SPECIAL VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED FEBRUARY 18, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93-2088 SBA

DAVID HERN,

Plaintiff,

vs.

INTERMEDICS, INC.,

Defendant.

SPECIAL VERDICT FORM

SPECIAL VERDICT

WE, THE JURY IN THE ABOVE ENTITLED ACTION, FIND THE FOLLOWING SPECIAL VERDICT ON THE QUESTIONS SUBMITTED TO US:

[The jury is requested to answer the following questions. Each question requires the unanimous vote of all seven jurors.]

Appendix D

I. *Strict Products Liability*

(1) Was there a manufacturing defect in the Quantum 253-19 pacemaker which was implanted in the plaintiff?

Answer: (yes or no) Yes

(2) If your answer to question (1) is "yes," then answer this question: Did the defect exist when it left the possession of defendant?

Answer: (yes or no) Yes

(3) If your answer to question (2) is "yes," then answer this question: Was such defect a legal cause of an injury to plaintiff?

Answer: (yes or no) Yes

II. *Negligence*

(4) Was the defendant negligent?

Answer: (yes or no) Yes

(5) If your answer to number (4) is "yes," then answer this question: Was defendant's negligence a legal cause of an injury to plaintiff?

Answer: (yes or no) Yes

Appendix D

III. *Contributory Negligence*

(6) Was plaintiff negligent?

Answer: (yes or no) Yes

(7) If your answer to question (6) is "yes," then answer this question: Was plaintiff's negligence a legal cause of his injuries with respect to plaintiff's claims for Strict Products Liability and Negligence?

Answer: (yes or no) Yes

(8) If your answer to question (7) is "yes," answer the following question: Assuming that 100% represents the total cause of plaintiff's damage resulting from plaintiff's claims for Strict Products Liability and/or Negligence, what percentage of fault causing plaintiff's injury or injuries do you attribute to:

Defendant: 41%

Plaintiff: 17%

Other: 42%

TOTAL: 100%

[If you find that a party has no fault in causing the plaintiff's injuries, then attribute zero (0) percentage of the fault to that party.]

(9) Disregarding any negligence of plaintiff, what sum of money would reasonably compensate plaintiff for his claimed injury and damage?

Economic:	$38,809
Non-Economic:	$68,074
TOTAL:	$106,883

IV. *Fraud by Concealment*

(10) Did defendant suppress or conceal a material fact which it had a duty to disclose?

Answer: (yes or no) No

* * *

V. *Intentional Infliction of Emotional Distress*

(16) Did defendant engage in extreme and outrageous conduct?

Answer: (yes or no) No

* * *

Appendix D

VI. *Breach of Express Warranty*

(21) Did defendant make any affirmative representation of fact or promise regarding the Quantum 253-19 pacemaker which was implanted in the plaintiff?

Answer: (yes or no) Yes

(22) If your answer to number (21) is 'yes,' then answer this question: Did the defendant's affirmative representation of fact or promise regarding the pacemaker become a part of the basis for the bargain between defendant and plaintiff?

Answer: (yes or no) Yes

(23) If your answer to number (22) is 'yes,' then answer this question: Did the Quantum 253-19 pacemaker which was implanted in the plaintiff fail to conform to the affirmation or promise made by defendant?

Answer: (yes or no) Yes

(24) If your answer to number (23) is "yes," then answer this question: Was the pacemaker's failure to conform to the defendant's affirmation or promise a legal cause of injury to the plaintiff?

Answer: (yes or no) Yes

(25) What sum of money would reasonably compensate plaintiff for his claimed injury and damage caused by defendant breach of express warranty?

Answer: $15,000

Appendix D

VII. *Punitive Damages*

(26) Do you find by clear and convincing evidence that the defendant committed oppression in the conduct upon which you base your finding of liability for any of the above claims. [If you have found no liability on any of plaintiff's claims, do not answer any further questions and sign the form below].

Answer: (yes or no) Yes

(27) Do you find by clear and convincing evidence that the defendant committed malice in the conduct upon which you base your finding of liability for any of the above claims.

Answer: (yes or no) Yes

(28) Do you find by clear and convincing evidence that the defendant committed fraud in the conduct upon which you base your finding of liability for any of the above claims.

Answer: (yes or no) No

(29) The **total** amount of damages awarded to plaintiff in this action, if any, is $121,883.

DATED: February 18, 1997

s/ Linda Morris
Foreperson

APPENDIX E — VERDICT QUESTIONNAIRE I OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED FEBRUARY 24, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93-2088 SBA

DAVID HERN,

Plaintiff,

vs.

INTERMEDICS, INC.,

Defendant.

SPECIAL VERDICT FORM

VERDICT QUESTIONNAIRE I

All Jurors Must Agree on the Answers to All of the Following Questions:

III. CONTRIBUTORY NEGLIGENCE

1. In reference to your verdict that Plaintiff's negligence contributed to his own injury, assuming that 100 percent represents the total cause of Plaintiff's damage resulting from Plaintiff's claims for Strict Products Liability and/or Negligence, what percentage of fault causing Plaintiff's injuries do you attribute to:

Appendix E

Defendant 71%

Plaintiff 29%

Total 100 percent

The Foreperson of the jury should sign and date this Verdict Questionnaire.

DATED: February 24, 1997

s/ Linda Morris
Foreperson

APPENDIX F — SPECIAL VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED MARCH 3, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93-2088 SBA

DAVID HERN,

Plaintiff,

vs.

INTERMEDICS, INC.,

Defendant.

SPECIAL VERDICT FORM
(PUNITIVE DAMAGES)

SPECIAL VERDICT

WE, THE JURY IN THE ABOVE ENTITLED ACTION, FIND THE FOLLOWING SPECIAL VERDICT ON THE QUESTIONS SUBMITTED TO US:

WRITE THE ANSWER "YES" OR "NO" AFTER THE FOLLOWING QUESTIONS:

(1) Shall punitive damages be assessed against the defendant?

Answer (Yes or No): Yes

Appendix F

If your answer is "Yes," answer the next question. If your answer is "No,", have your foreperson sign and date this special verdict.

(2) We assess punitive damages against the defendant in the following amount:

$1,550,000.00 (1.55 MILLION DOLLARS)

DATED: March 3, 1997

s/ Linda Morris
Foreperson

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16769

DC# CV-93-02088-SBA

DAVID HERN,

Plaintiff-Appellee,

v.

INTERMEDICS, INC., a Delaware corporation,

Defendant-Appellant.

ORDER

Before: VAN GRAAFEILAND,[1] ALARCÓN, and SILVERMAN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Silverman has voted to deny the petition for rehearing en banc, and Judges Van Graafeiland and Alarcón recommended denial.

---

1. Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge, for the Second Circuit, sitting by designation.

Appendix G

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX H — RELEVANT STATUTES

Cal. Civ. Code § 1431.1

1431.1. Findings and Declaration of Purpose

The People of the State of California find and declare as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People — taxpayers and consumers alike — ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions

shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

* * *

Cal. Civ. Code § 1431.2

1431.2. Several Liability for Non-economic Damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

* * *

Cal. Civ. Code § 1431.3

1431.3. Nothing contained in this measure is intended, in any way, to alter the law of immunity.

* * *

Cal. Civ. Code § 1431.4

1431.4. Amendment or Repeal of Measure.

This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

* * *

Cal. Civ. Code § 1431.5

1431.5. Severability.

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable.

* * * *

APPENDIX I — UNPUBLISHED DECISIONS

Provident Life & Acc. Ins. Co. v. The Paul Revere Life Ins. Co., No. 98-55546 (9th Cir., Nov. 23, 1999)

Koo v. Stipek, No. 97-35385, 162 F.3d 1168 (9th Cir. 1998) (Table)

Helionetics, Inc. v. Paige & Assoc., No. 95-55734, 100 F.3d 962 (9th Cir. 1996) (Table)

James v. Southern Cal. Edison Co., No. 95-56842, 94 F.3d 651 (9th Cir. 1996) (Table)

Gorio v. Block, No. 87-6334, 972 F.2d 1339 (9th Cir. 1992) (Table)

Stone v. River, No. 91-55287, 960 F.2d 152 (9th Cir. 1992) (Table)

Bluestein v. Groover, No. 88-15048, 940 F.2d 667 (9th Cir. 1991) (Table)

Williams v. VISA USA, Inc., No. 88-6755, 935 F.2d 277 (9th Cir. 1991) (Table)

Safeco Ins. Co. of Am. v. Duckett, No. 86-2396, 852 F.2d 1290 (9th Cir. 1988) (Table)

Sharif v. Interocean Man. Corp., No. 86-4361, 849 F.2d 1476 (9th Cir. 1988) (Table)

Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

(2)

No. 99-2053

In The

Supreme Court of the United States

DAVID HERN,

Petitioner,

v.

INTERMEDICS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in concluding that, under the facts of this case, the defendant's liability was so inextricably intertwined with the allocation of fault between the defendant and an absent party that, where reversible error infected the allocation issue, justice demanded that the defendant be given a new trial on all issues.

2. Whether the court of appeals erred in concluding that, under the facts of this case, plaintiff's counsel's misconduct was sufficiently prejudicial to warrant reversal.

CORPORATE DISCLOSURE STATEMENT

The following publicly traded companies hold or held during the relevant time more than 10% of the stock of Intermedics, Inc.:

Sulzer Medica Ltd. (NYSE: "SM")

Guidant Corporation (NYSE & PCX: "GDT")

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Lies v. Farrell Lines, Inc., 641 F.2d 765 (9th Cir. 1981) 5

Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999) 5

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RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner Michael Hern obtained a judgment against respondent Intermedics, Inc. for compensatory and punitive damages for personal injuries in a trial tainted by judicial error and attorney misconduct. In an unpublished opinion written by the Honorable Ellsworth A. Van Graafeiland, a Senior Circuit Judge visiting from the Second Circuit, the court of appeals reversed and ordered a new trial on all issues.

Mr. Hern does not dispute that the trial was tainted by both error on the part of the trial judge and egregious misconduct on the part of Mr. Hern's counsel. Instead, he complains that (1) the misconduct was not so prejudicial as to merit reversal; and (2) the issue tainted by the district court's error was so isolated from the other issues tried that he should be able to take advantage of significant parts of the judgment that resulted from the error-ridden trial.

Mr. Hern's petition thus seeks review of an unpublished decision that creates no precedential conflict and that presents no issue requiring the interpretation of the constitution or of a federal or state statute. Nor does the petition otherwise raise any issue of nationwide significance. Rather, Mr. Hern asserts only that the court of appeals' opinion was erroneous. But the court of appeals' decision was firmly rooted in the facts of this case. It has no special significance and no impact on the development of the law. And in any event, the court of appeals' decision was correct under the facts of this case. The petition should therefore be denied.

STATEMENT OF THE CASE

Intermedics manufactures pacemakers, one of which was implanted in Mr. Hern to accelerate his natural heart rhythm. (Reporter's Transcript ("RT") 65, 105, 277-78, 1232-33, 1238) The pacemaker's battery apparently depleted prematurely, causing the pacemaker to fail after approximately three and a half years instead of the usual five to ten. (RT 177, 282-83, 300, 341, 378, 471-72, 932-33, 1386-87) When Mr. Hern went to the hospital complaining of an earache, the attending physician determined that his pacemaker had stopped working. (RT 67, 77, 1391, 1410; Excerpts of Record ("ER") 242) The following day, the pacemaker was removed and replaced without incident. (RT 67, 78, 204-205, 1393-94)

Before Mr. Hern's pacemaker failed, Intermedics had sent a safety alert to the physicians of all known users of that model with that particular battery. (RT 66, 1257; ER 152-56) That notice was received by four physicians and administrators at the Kaiser hospital in Los Angeles where Mr. Hern's pacemaker had been implanted. (RT 67, 162-63, 187, 297) But Mr. Hern had moved to the San Francisco Bay Area, where he was being cared for by a new Kaiser doctor. (RT 109, 451-52) Kaiser failed to notify Mr. Hern's new Kaiser doctor about the safety alert. (RT 288-89, 311-13, 464, 492)

Mr. Hern claimed that his life had been ruined by the premature pacemaker failure, and he and sought millions of dollars in damages from Intermedics. (RT 1772-77, 1784, 1791-95; ER 1-12) Intermedics contested all aspects of Mr. Hern's allegations; among other things, Intermedics wanted to ask the jury to attribute fault to Kaiser

for failing to ensure that Mr. Hern's doctor received the safety alert. (RT 48, 447, 1645-76; ER 17, 19) But the district court refused to allow Intermedics to ask the jury to place any part of the blame on Kaiser. (RT 1647-77)

In final argument, Mr. Hern's lawyer told the jury that other people had died on account of similar battery failures, but that Mr. Hern had been prevented from bringing that evidence before the jury. (RT 2075-76) Because the uncontradicted evidence established that the battery failures had in fact caused no significant injuries or deaths—and because the district court had not excluded any competent evidence to the contrary—Intermedics objected. (RT 2075) But the district court overruled the objection. (RT 2075) Later, the district court gave the jury a confusing admonition that only exacerbated the problem, whereupon Mr. Hern's lawyer repeated her improper suggestion that Intermedics had caused deaths, even though Mr. Hern had produced no such evidence. (RT 2077-78)

The jury awarded Mr. Hern $90,886.93 in compensatory damages and $1,550,000 in punitive damages. (RT 1951, 1953, 2024-25; ER 272, 274, 289, 325-28) Intermedics moved for a new trial or judgment on multiple grounds. (ER 329-57, 389-409) The district court took the motions under submission (without oral argument) for thirteen months and then denied all relief. (Appendix ("App.") 16-43) Intermedics appealed, arguing among other things that Mr. Hern's counsel had committed prejudicial misconduct and that the district court had committed reversible error in prohibiting Intermedics from asking the jury to assign any of the fault to Kaiser.

The court of appeals agreed with both claims, and it therefore reversed and ordered a new trial. (App. 15) The court set forth its reasoning in an unpublished opinion authored by the Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge for the Second Circuit, sitting by designation. (App. 1-15)

WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Issue of Precedential Conflict. Although Mr. Hern claims that the court of appeals' opinion conflicts with other cases, the opinion is not published, and it cannot be cited as precedent. It therefore has no significance in the development of the law. Thus, even if the court of appeals erred—which it did not—its opinion would stand as an isolated case, undeserving of the time and attention of this Court.

2. The Petition Presents No Issue Involving the Interpretation of Any Constitutional Provision. Although Mr. Hern attempts to portray this as a Seventh Amendment case, the law in that area is well settled, no Seventh Amendment issue was briefed or decided by the court of appeals, and the petition does not in fact present any issue that implicates the Seventh Amendment.

3. The Petition Presents No Issue of Federal Statutory Construction. No federal statute is at issue in this case.

4. The Petition Presents No Issue of State Statutory Construction. Although the court of appeals' opinion does construe California's Proposition 51 (Cal. Civ.

Code § 1431.2) , its construction is in line with California authority, and the petition does not challenge that construction in any way.

5. The Petition Raises No Issue of Special Significance. Mr. Hern raises no issue of nationwide import that must be resolved by this Court. Mr. Hern complains only that (1) his lawyer's misconduct was not so prejudicial as to justify reversal; and (2) the court of appeals ordered broader relief than the circumstances of this particular case warranted. Both of those issues are firmly rooted in the facts and circumstances of this case, and neither merits resolution by this Court.

6. The Court Of Appeals Committed No Error. Because the petition so plainly fails to satisfy the requirements of Rule 10, a lengthy analysis of the merits of Mr. Hern's claims is unnecessary at this juncture. But Mr. Hern has misstated the law on both points.

To begin with, while there is certainly authority that the court of appeals was not *required* to order a complete new trial, none of the cases that Mr. Hern cites holds that it was *prohibited* from doing so. To the contrary, those cases recognize that the courts of appeals have broad discretion in deciding whether to limit the issues when remanding for a new trial, and that they should order a complete new trial when the issues are inextricably intertwined. *E.g.*, *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F.3d 1221, 1255 (10th Cir. 1999); *La Plante v. American Honda Motor Co.*, 27 F.3d 731, 738 (1st Cir. 1994); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774 (9th Cir. 1981). In this case, the court of appeals concluded that Intermedics's liability was so inextricably

intertwined with the allocation of fault between it and Kaiser that justice demanded a retrial of all issues. Given that the same facts are relevant to both issues, the two issues are about as intertwined as could be. In fact, the same evidence is also relevant to the punitive damages issue—which the court of appeals found also needed to be retried. Thus, a retrial on all issues will not take any more time than a partial retrial. For these reasons, the court of appeals' grant of a new trial on all issues cannot be deemed an abuse of discretion.

Mr. Hern also misstates the court of appeals' analysis of the misconduct issue. To begin with, the opinion does far more than say that the jury verdict was "influenced" by the misconduct. (Petition ("Pet.") 6) The court of appeals' opinion devotes two and a half pages to explaining why the misconduct was sufficiently prejudicial to require reversal. (App. 10-12)

Mr. Hern further misstates the holdings of the cases he cites on this issue in two respects. First, contrary to Mr. Hern's claim, the Ninth Circuit has not held that misconduct during closing argument can *never* be sufficiently prejudicial to warrant reversal. The cases that Mr. Hern cites merely recite several factors that the court has used in determining whether the district court abused its discretion in refusing to grant a new trial. One of those factors is whether the statements were isolated or persistent, and another is whether the damages are excessive. *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283 (9th Cir. 1984). But each case must be viewed on its own facts, and neither *Kehr* nor any other case holds that the absence of any particular factor precludes a finding that the misconduct was so prejudicial as to require a new

trial. In any event, the court of appeals did not determine whether the punitive damages awarded in this case were excessive; the court did not need to reach the issue.

Second, Mr. Hern misstates *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3d Cir. 1999), which he claims "reached a contrary conclusion" from *Kehr*. (Pet. 15) The court of appeals in *Greenleaf* held that the district court had not abused its discretion in denying a new trial on grounds of attorney misconduct, just like in *Kehr*. While the Ninth Circuit and Third Circuit tests are worded slightly differently, Mr. Hern points to no substantive difference between them, and none is apparent. The cases are completely consistent.

CONCLUSION

Mr. Hern, Intermedics, and the court of appeals all agree that the trial in this case was riddled with judicial error and lawyer misconduct. The only disagreement is the remedy. Mr. Hern suggests that a muddled instruction adequately cured his lawyer's misconduct; the court of appeals held that Mr. Hern's lawyer had done too much damage and that the trial court failed to fix the problem. Mr. Hern also suggests that he should be able to maintain some of the benefits of the error-ridden trial; the court of appeals opted for a complete re-trial, which in this case will take no longer than a partial re-trial.

This petition thus does not even come close to meeting the criteria this Court has expressed for granting *certiorari*. There is simply no reason for this Court to substitute its discretion for that expressed in the court of

appeals' unpublished opinion. The Court should therefore deny the petition.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

JACQUES LEBOEUF
Attorneys for Respondent
Intermedics, Inc.

Supreme Court, U.S.
FILED
AUG - 1 2000
CLERK

(3)

No. 99-2053

IN THE

Supreme Court of the United States

DAVID HERN,

Petitioner,

v.

INTERMEDICS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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SUMMARY OF ARGUMENT

Petitioner David Hern[1] hereby replies to the opposition to his petition for certiorari. The petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, which in an unpublished decision dated February 3, 2000, reversed on very limited grounds and few factual findings all issues of liability and damages decided in a jury verdict.[2]

While Respondent's opposition is riddled with misstatements of facts and law, it completely misleads the Court with respect to the precedential nature of the Ninth Circuit's unpublished decision. Respondent argues that the petition presents no "precedential conflict," because the Ninth Circuit's unpublished decision cannot be cited as precedent. Under a rule change effective July 1, 2000, unpublished decisions in the Ninth Circuit may "be cited for purposes beyond law of the case, res judicata or collateral estoppel," even though they are not "binding precedent."[3] Consequently, Respondent's suggestion that this case does not warrant the Court's review, because it is unpublished, ignores the reality: The Ninth Circuit's decision makes bad law, which can be repeated both within the circuit and beyond if it is allowed to stand.

The reasons the Ninth Circuit's decision below makes bad law were fully discussed in the petition for writ of certiorari. First, the Ninth Circuit failed to properly apply the Seventh Amendment to the U.S. Constitution, as well as long-standing

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1. To show just how far removed from the facts and the law of this case it is, Respondent incorrectly refers to Petitioner as *Michael* Hern. Opposition ("Opp.") at 1.

2. Respondent repeatedly emphasizes that the decision on review was penned by the Honorable Ellsworth A. Van Graafeiland, a Senior Circuit Judge visiting from the Second Circuit, in a transparent effort to avoid any association between the court's decision and the Ninth Circuit. Opp. at 1, 4. However, the opinion does not attribute authorship to any one of the panel members who heard the case. App. A at 2a.

3. Ninth Circuit Rule 36-3(b)(2)(ii), (iii) (amended July 1, 2000).

Supreme Court precedent, when it ordered an entire new trial on liability and damages, though Respondent did not challenge the jury's verdict in its entirety. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Respondent argues that the Ninth Circuit's ruling was proper, because the issue of Respondent's liability is "inextricably intertwined" with the allocation of fault between Respondent and Petitioner's physicians, who were not parties to this case. Opp. at 5-6. This argument directly contradicts the position Respondent took before the district court and the Ninth Circuit, and amply demonstrates that the Ninth Circuit failed to give due consideration to the issue of a properly limited retrial.

Second, the Ninth Circuit applied a different standard from other circuits (as well as the decisions of other panels in the Ninth Circuit) in reversing the award of punitive damages on the issue of attorney misconduct. Opp. at 4. Respondent somewhat comically argues that, because the results of the cases cited were the same, the decisions among the circuits were consistent. That argument, however, is logically flawed on its face; the mere fact that two courts reached a similar conclusion in different cases does not mean that there is no conflict between those courts and among the circuits regarding the proper standard to be applied where a party seeks to reverse a jury verdict because of alleged attorney misconduct.[4]

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4. Respondent incorrectly argues that Petitioner "agrees that the trial was tainted by judicial error and attorney misconduct." Opp. at 1, 7. A more bogus statement of Petitioner's case could not be made. Petitioner vigorously argued before the Ninth Circuit that there was *no* error during the trial, that counsel's statements in final closing argument do *not* rise to the level of misconduct under the law, and that the judgment should be affirmed in its entirety. *See* App. A. Indeed, Petitioner continued to argue before the Ninth Circuit on its petition for rehearing that there was no error below or attorney misconduct. Petitioner has not repeated those arguments in his Petition simply because they do not present the kinds of concerns which this Court deems appropriate for review on a writ of certiorari. *See* Sup. Ct. R. 10.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT, OTHER CIRCUITS, AND THE NINTH CIRCUIT REGARDING WHEN A NEW TRIAL ON ALL ISSUES IS REQUIRED.

In its opposition to the petition, Respondent does not challenge Petitioner's statement that, on appeal below, Respondent did *not* seek a reversal of the entire judgment in the Ninth Circuit, nor did it ever argue before the Ninth Circuit that reversal of the entire verdict was necessary or required. Petition ("Pet.") at 4. Yet, Respondent now argues that the issue of its liability for strict product liability, negligence, and breach of warranty, as well as whether it acted with malice and oppression, are "inextricably intertwined" with the issue of whether some comparative fault should be allocated to Petitioner's physicians, who are not parties to this action. Opp. at 5-6. However, Respondent fails to explain how the issue of whether Petitioner's physicians were contributorily negligent for failing to notify him that his pacemaker was potentially defective can be "inextricably intertwined" with the jury's findings that:

- The pacemaker had a manufacturing defect;
- Petitioner was injured when the pacemaker failed;
- Petitioner's injuries resulted in damages of a certain amount, regardless of whose fault caused them;
- Respondent breached its warranty to Petitioner; and . . .
- Respondent acted with malice and oppression.

App. D.

Respondent further argues that it was appropriate for the Ninth Circuit to have "concluded . . . that justice demanded a retrial of all issues," without citing to the decision. Opp. at 5-6. Nowhere in the panel decision does the Ninth Circuit suggest that it considered — much less made findings on — the issue of whether the physician's alleged comparative fault was so "inextricably intertwined" with Respondent's as to warrant a complete retrial of liability and damages. Nor were any findings made that "justice demanded a retrial of all issues." In fact, the Seventh Amendment to the U.S. Constitution suggests that justice requires a limited retrial under circumstances like these, where only a few separate and distinct jury findings are challenged on appeal. *Gasoline Products*, 283 U.S. at 500.

Instead, through the use of loose language and a disregard of the record before it, the Ninth Circuit appears to order such a retrial. App. A at 15a. Indeed, any doubt that the Ninth Circuit failed to consider the propriety of a limited retrial is overwhelmed by its ruling that a retrial on the issue of "damages" is required, because of the prejudicial misconduct of counsel. App. A at 15a. However, *the purported misconduct occurred during the closing argument in the second phase of the trial, when the only issue to be decided was the amount of Petitioner's punitive damages*; Petitioner's compensatory damage award had been made two weeks earlier. App. D; App. F at 54a-55a.

Respondent further argues that a retrial of all issues "will not take any more time than a partial retrial." Opp. at 5. That patently self-serving argument completely ignores the record in this case, and is irrelevant to the issues that warrant a grant of certiorari.[5]

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5. Contrary to Respondent's assertion, a retrial on all issues will take significantly more time — to say nothing of the costs to both the court and the parties — than a limited retrial. At trial, Petitioner introduced several expert witnesses to prove that his pacemaker was defective, that he was injured when his pacemaker failed, and that (Cont'd)

Whether the issues to be retried are so intertwined with the other issues in the case as to require a full retrial is only one question the Ninth Circuit should have considered before reversing the entire verdict. *See, e.g., Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F.3d 1221, 1255 (10th Cir. 1999). Consistent with other circuits, the Ninth Circuit should have considered whether the error calls into question the jury's prior finding on liability. *Id.* Where the parties have had a full and fair trial on certain issues, the court of appeals has a duty to protect the prevailing party's interest in the finality of that judgment. *Trejo v. Denver & Rio Grande Western Railroad Co.*, 568 F.2d 181, 185 (10th Cir. 1977).[6]

This case presents the Court with an opportunity to consider whether it is appropriate for a court of appeals to order a retrial of an entire case where, as here, the appellant did not appeal from certain aspects of the verdict; never argued on appeal that full retrial is necessary; and the jury's special verdict provided adequate detailed findings that would allow the court to determine which issues need not be retried. This case also provides a vehicle whereby the Court can consider whether this Court's precedent, and the interests of finality of judgments and judicial economy, require the courts of appeal to address the issue of a limited retrial in situations similar to those presented in this case. Petitioner submits that this is an important issue that should be considered by the Court in these times when expanding dockets are burdening the federal judiciary.

(Cont'd)
Respondent acted with malice and oppression. *None of this evidence will be required in a limited retrial on the issues of apportionment or on the amount of punitive damages.* In any event, Respondent has not cited a single case in which a court has held this to be a relevant consideration in determining whether to grant a full or partial retrial.

6. Respondent contends that Petitioner is attempting to "take advantage of significant parts of the judgment that resulted from the error-ridden trial." Opp. at 1, 7. To the contrary, Petitioner has a right to finality of those aspects of the judgment which were not affected by error and which Respondent did not challenge on appeal.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND DECISIONS IN THE NINTH CIRCUIT, REGARDING WHEN A CIVIL VERDICT SHOULD BE REVERSED FOR ATTORNEY MISCONDUCT.

Respondent does not directly challenge Petitioner's contention that there is a conflict among the circuits regarding an issue that has never been addressed by this Court: When should a jury verdict in a civil case be reversed because of the misconduct of counsel? While the Ninth Circuit in this case held that the verdict should be reversed because the court was convinced that the jury was "influenced" by counsel's statements (App. A at 11a), other circuits (as well as other panels in the Ninth Circuit) have required a showing that the jury's award of damages was excessive in light of the evidence, *i.e.*, the verdict itself must show that the jury was actually prejudiced by the alleged misconduct. Pet. at 12.

Indeed, Respondent attempts to argue that, because the *result* in *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3d Cir. 1999) was the same as the *result* in *Kehr v. Smith, Barney, Harris, Upham & Co.*, 736 F.2d 1283 (9th Cir. 1984), there is no conflict among the circuits warranting this Court's review. Opp. at 7.[7]

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7. To support its argument, Respondent referred to Petitioner's statement that the court in *Greenleaf* "reached a different conclusion" from the court in *Kehr*. Opp. at 7. By that statement, Petitioner was suggesting that the *Greenleaf* court's conclusion as to what was the appropriate standard to apply to attorney misconduct in a civil trial differed from the *Kehr* court's conclusion as to the appropriate standard, a statement which is true. Pet. at 14-15. The statement was not intended to refer to the court's ultimate finding that the district court did not abuse its discretion in denying a new trial on the ground of attorney misconduct. The outcome of a particular case is of little interest to this Court on petition for a writ of certiorari; inconsistent application of the law to the facts in various cases among the circuits is, however.

However, Respondent's focus on the result rather than on the reasoning of those cases, as well as its failure to discuss *Pappas v. Middle Earth Condominium Assoc.*, 963 F.2d 534, 540 (2d Cir. 1992), ignore the reality that there *is* a conflict among the circuits. In *Greenleaf*, the court adopted the standard that a new trial may be granted where it is reasonably probable that improper statements influenced jury. 174 F.2d at 363-64. Likewise, in *Pappas*, the court held that a new trial should be granted where remarks during closing argument unfairly influenced the verdict. 963 F.2d at 540. The holdings in *Greenleaf* and *Pappas* are consistent with the Ninth Circuit's decision in this case, and they clearly conflict with the holdings in other circuits as well as with the Ninth Circuit's holdings in a multitude of other cases. *See* Pet. at 14-15, 17-18. In each of those cases, the courts held that attorney misconduct does not warrant a reversal where the alleged conduct did not result in actual prejudice to the jury and the jury did not award excessive damages.[8]

The integrity of the judicial system is compromised when there is uncertainty as to the standard the courts will apply to reverse a verdict on the ground of attorney misconduct. The conflict among the circuits on this important issue cries for some direction from this Court.

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8. Petitioner did not argue, as Respondent suggested, that the Ninth Circuit has held that misconduct during closing argument can never be sufficient to warrant reversal. Opp. at 6. Instead, Petitioner argued that, prior to this case, the Ninth Circuit has consistently held that a court must find the misconduct *directly affected* the award of damages. Pet. at 17-18. Petitioner did show, however, that in 15 prior cases (five published and 10 unpublished decisions), the Ninth Circuit never once reversed a district court's finding that statements made during closing argument did not rise to the level of prejudicial misconduct. Pet. at 17-18, n.9 and App. I. Thus, the court's use of a different standard in this case directly affected the outcome of the appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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